INDUSTRIAL DISEASE - UPDATE

CALUM WILSON K.C.

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Some basic propositions

- (1) It does not matter that at the relevant time diseases understood to be caused by exposure to asbestos did not include mesothelioma. The foreseeable risk need not be of mesothelioma. It is sufficient if any personal injury to a primary victim is foreseeable.
  - (See e.g. *Jeromson v Shell Tankers (UK) Ltd; Dawson v Cherry Tree Machine Co Ltd and Another* [2001] I.C.R. 1223, per Hale LJ at para 32).
- (2) "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."
  - (*Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 W.L.R. 1776, per Swanwick J at 1783).

Some basic propositions

- (3) "Between the 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."
  - (*Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] I.C.R 236, per Mustill J at 247).

Some basic propositions

- (4) The classic statements by Swanwick J and Mustill J
- identify two qualifications on the extent to which an employer can rely upon a recognised and established practice to exonerate itself from liability in negligence for failing to take further steps: one where the practice is 'clearly bad', the other where, in the light of developing knowledge about the risks involved in some location or operation, a particular employer has acquired 'greater than average knowledge of the risks'."
  - (per Lord Mance in *Baker v Quantum Clothing Group Limted* [2011] UKSC 17 at para 21)

Jeromson v Shell Tankers (UK) Ltd; Dawson v Cherry Tree Machine Co Ltd and Another [2001] I.C.R. 1223

- Court of Appeal - provided guidance as to what was expected at common law where the precise extent of the risk faced by employees was not known and where there was a developing amount of relevant literature
- Respective employment dates of employees 1957 to 1961 and 1951 to 1957
- Exposure to asbestos when undertaking repairs on oil tankers
- Involved stripping lagging from pipes
- At first instance claimants were successful
- Shell advanced a number of arguments on appeal
- Hale LJ delivered the leading judgment

Jeromson – exposure and risk

- It was submitted on behalf of Shell that in relation to whether a risk should have been identified the court should consider average as opposed to potential exposure.
- This was rejected:
- "…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." (At para 37).

Jeromson - literature

- Hale LJ dismissed Shell's appeal and addressed what an employer such as Shell ought to have made of the relevant literature
  - This included the Merewether and Price Report and relevant Annual Reports of the Chief Inspector of Factories
  - Also under consideration were the Asbestos Industry Regulations 1931 and the Factories Act 1937, section 47
- Merewether had stated what should have been obvious to the prudent reader – given the high incidence of asbestosis following exposure periods longer than 5 years, it would have been quite unsafe for anyone to conclude what might be the safe level of exposure.
  - "The message … was that asbestos dust is harmful and the precaution needed is to suppress it." (At para 45)

Jeromson - literature

- The obligations contained in the 1931 Regulations were strict, a considerable warning of the dangers involved (para 46).
- Section 47 of the Factories Act 1937 prohibited exposure to any dust "… of such a character and to such extent as to be likely to be injurious or offensive or of any substantial quantity of dust of any kind."
- The 1938 Annual Report of the Chief Inspector of Factories was cited with apparent approval – this had contained a passage that section 47 required precautions even before it was possible to say specifically that the dust in question was harmful to a recognisable pathological extent (para 47).
- Hale LJ cited (at para 51) with approval the approach of the first instance judge Buxton J in *Owen v IMI Yorkshire Copper Tube,* Unreported, 15th June 1995 - who had reviewed literature - and had stated that from the beginning of the employment in 1951
  - "…the difficulties related to and threats posed by asbestos were sufficiently well-known, and sufficiently uncertain in their extent and effect, for employers to be under a duty to reduce exposure to the greatest extent possible."

Maguire v Harland andWolff plc [2005] EWCA Civ 1

- Issue – whether by April 1965 it should have been apparent to employers whose employees were working with asbestos that persons who had secondary and intermittent exposure were at risk of injury
- Deceased contracted mesothelioma from having washed the overalls, contaminated by asbestos, of her husband, who had worked in a shipyard
- Exposure was between 1961 and 1965
- There had been a failure by the employer to take all practicable measures - Morland J found for the claimant
- The Court of Appeal by a majority reversed the decision – the risks of secondary domestic exposure were not sufficiently well-known until late 1965 – the finding that the risk was "reasonably foreseeable" and "obvious" was not sustainable

Maguire – permissible concentration levels?

- *Maguire* is of interest as the court required to consider a period over which publications had drawn attention to concentration levels
- Two of the publications under consideration by the court were:
- (1) Toxic Substances in Factory Atmospheres (Factories Inspectorate) (1960)
  - A booklet, which set out tabular figures of maximum permissible concentrations of substances including asbestos
  - The figure given could be regarded as equivalent to 5-30 fibre/ml
- (2) Chief Inspector's Annual Report for 1959 (September 1960)
  - This referred to then recent publication of the booklet "…showing the maximum concentrations of certain dusts … which if exceeded in factory atmospheres indicate that working conditions cannot be considered to be satisfactory."

Maguire – extent of exposure and permissible concentration levels?

- It was clear from the joint experts' evidence that the level of exposure to which the deceased's wife would have been exposed would on average over a whole working day have been much lower than that contemplated as permissible in the 1960 Booklet in the case of workers with asbestos
- On the basis, however, of the evidence of the state of the deceased's clothing when he returned home she would, for at least a short period on many working days between 1960 and 1965 regularly have exceeded the level given
  - (See paras 10, 11 and 76)

Maguire – court's approach

- The court considered whether it could be suggested that the appellant employers were not in breach of duty to the deceased's wife since they did not expose her to any average exposure which would not have been permissible in relation to their employees.
- Neither of the publications "…can be read as legitimising a failure to take practicable steps to reduce exposure to dust, even if it happened that the average exposure was not thereby increased above that contemplated in the List."
- "The List was, in short, not a justification for foregoing practicable measures to reduce exposure to dust, but the minimum which should be achievable by taking all practicable measures."
- (per Mance LJ at para 77)

Maguire – court's approach

- There was reference to the *Jeromson* case in which the court had followed the approach of Buxton J in in *Owen v IMI Yorkshire Copper Tube*:
- "(w)e are, therefore, bound to proceed on the basis that as between employer and employee, the employer will be in breach of duty if he fails to reduce his employee's exposure 'to the greatest extent possible', reading possible as 'practicable', the word used in section 47 of the Factories Act 1937."
  - (per Longmore LJ at para 91)

Abraham v G. Ireson & Son (Properties) Ltd and Stanley Reynolds [2009] EWHC 1958 (QB)

- Issue – whether the risk of injury arising from claimant's asbestos exposure ought reasonably to have been foreseen by a careful employer to extent that it ought to have taken precautions, or at least taken advice
- Plumber's apprentice/plumber with first defendants, continued as plumber
- First defendant employer - general builders working at domestic premises
  - exposure during employment between 1956 and 1961
  - exposure light and intermittent
- Second defendant employer - undertook domestic plumbing work
  - exposure during employment between 1962/63 and later 1965
  - exposure light and intermittent

Abraham – exposure

- Exposure –
- Use of small asbestos scorch pad – with second defendant – "relatively infrequent"
  - claimant carried pad with him
  - pad would fray and disintegrate
  - dust (which he would not notice) came off pad while he worked – he would get a little dust onto his hands
- Use of asbestos string
  - used for sealing ("caulking") pipe joints
  - dust given off from string when cut
  - string was packed around the joint to be sealed – claimant tapped it down with tool
  - this generally done in open air

Abraham – exposure levels

- Conclusions on levels of exposure
  - Scorch pad
    - exposure from use intermittent only
    - varied according to job being done
    - levels “low”
    - no conclusion could be reached on precise levels
  - Asbestos string
    - any exposure at a low level

Abraham – literature

- Swift J conducted a review of relevant literature
- Toxic Substances in Factory Atmospheres Ministry of Labour (1960 and subsequent versions)
- In the booklet the maximum permissible concentration for asbestos was identified as what approximated to a UK equivalent of 30 fibres/ml
- Swift J noted that the relevant section of the Booklet stated that if the concentration was exceeded "further action (was) necessary to achieve satisfactory working conditions."
- In 1965 following publication of the Newhouse and Thompson paper – given newspaper publicity – there was a publicised and recognised link between asbestos exposure and mesothelioma

Abraham - decision

- Question for the court – whether the relevant published material should have alerted an employer whose only exposure to asbestos was light and intermittent to the possibility that he might be at risk of contracting an asbestos related injury?
- Summary of claimant's submission –
  - the defendants could not have safely assumed that the levels of asbestos exposure to which claimant was being exposed were safe
- Summary of defendants' submission –
  - any exposure was well below the levels which were considered foreseeably hazardous prior to publication of the Newhouse and Thomson paper in 1965

Abraham - decision

- Swift J was not prepared to accept that the defendant employers should have appreciated that the claimant was at risk of asbestos related injury and failure to take precautions was negligent
- The 1960- booklet might have offered a degree of reassurance
- "…(t)he level at which the maximum average permissible concentration of asbestos dust over a working day was set was so much in excess of the levels to which the claimant was likely to be exposed that it may well have encouraged the defendants to believe (if they considered it) that the levels of asbestos dust to which the claimant was being exposed gave rise to no risk of injury. It seems to me that it was not until after the publication of the Newhouse and Thomson paper in 1965 at the earliest that employers could have been aware that asbestos exposure at the levels to which the claimant was subjected gave rise to a risk of injury."
  - (per Swift J at 85.)

Williams v University of Birmingham [2011] EWCA Civ 1242

- Claimant was an undergraduate student – at some point in 1974 performed some experiments in a tunnel beneath the University
- Tunnel contained pipes which were lagged with asbestos insulating material
- Tests showed claimant would have received at least some exposure to airborne asbestos fibres
- Exposure would have been 0.1 – 0.2 fibres/ml
- First instance – liability was established
- The decision was appealed

Williams – necessary factual findings

Aikens LJ set out what the court must address by way of factual findings to determine the foreseeability question with regard to exposed to the risk of personal injury in the form of contracting mesothelioma.(at para 44). This may be summarised as

- (i) actual level of exposure to asbestos fibres;
- (ii) knowledge that ought to have been had at the material time about the risks posed by that degree of exposure;
- (iii) whether, with that knowledge it was, or should have been, reasonably foreseeable that with that exposure level the claimant was likely to be exposed to asbestos related injury;
- (iv) the reasonable steps that ought to have been taken in light of the exposure to asbestos to which the claimant was exposed in fact; and
- (v) whether there was negligence in failing to take the necessary steps.
  - (This approach and analysis was endorsed by Lord Pentland in *Robert Prescott v University of St Andrews* [2016] CSOH 3 at para 64).

Williams – knowledge and risk

- The first instance judge (HHJ Belcher) had noted as propositions:
  - health risks posed by asbestos in general and particularly crocidolite were known by the mid- 1960s;
  - an association between low level exposure, particularly to crocidolite, and mesothelioma had been known about since the 1960s; and
  - the University knew or ought to have known by 1974 that the pipe lagging in the tunnel was asbestos.
- The judge was subject to criticism in the Court of Appeal for not recording specific findings about the degree of knowledge the University should have had, based on expert evidence and other materials, in 1974, on dangers of exposure to asbestos at any particular levels

Williams – knowledge and risk

- It was concluded that it had been insufficient for the judge to make such general findings on the state of knowledge
- The best view about what was an acceptable and unacceptable level of exposure was that given in the Technical data Note 13 (March 1970) - in particular guidance on crocidolite
- Moreover the appellants' submission was accepted, namely that
- "…there could only be a breach of duty of care by the University in 1974 if the judge had been able to conclude that if would have been reasonably foreseeable to a body in the position of this 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."
  - (per Aikens LJ at para 60)

Bussey v 00654701 Ltd [2018] EWCA Civ 243

- Deceased plumber was exposed to asbestos between 1965 and 1968
- The claim was dismissed by Judge Yelton following a finding that the deceased had not been exposed to asbestos levels in excess of those set out in Technical Data Note 13 (issued 1970)
- The judge had felt constrained by the authority of *Williams*
- The Court of Appeal noted that neither the cases of Jeromson nor Maguire was cited to the court in the *Williams* case

Bussey

Jackson LJ stated that he did not think that that if the court in *Williams* had had *Jeromson* and *Maguire* in mind, it – in particular Aikens LJ - would have suggested 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 time would have acquired and then to determine what risks such an employer should have foreseen."

- (per Jackson LJ at 49)

TDN13 set out exposure levels which would trigger a prosecution – a relevant consideration

The approach adopted in *Williams*, however, should not be read as making TDN13 a universal test of foreseeability (at 51)

Thacker v North British Steel Group Plc [2018] CSOH 73; 2018 S.L.T.799

- Lady Wise – judgment dated 11 July 2018
- Deceased died of mesothelioma
- Employed by defenders as an office junior and clerkess between 1963 and 1968
- Primary issue – was the defender in breach of the Factories Act 1961, s.63(1)

- The deceased had been exposed to substantial quantities of dust including asbestos dust and regularly and routinely.
- Referring to the 1965 Newhouse and Thompson paper, the defender knew or ought to have known that any exposure to asbestos dust was likely to be injurious to the deceased.
- Sufficient that the dust likely to be injurious to an employee.
- Under reference to *Maguire*, there was no need for the previous requirement of "heavy and prolonged exposure" before any duty could arise.

- Sufficient that the dust likely to be injurious to an employee.
- It was known by the 1960s that asbestos dust would be likely to cause injury and in particular the 1965 Newhouse and Thompson paper demonstrated that knowledge had developed by that stage about the causes of mesothelioma to put the defender on notice that anyone exposed to asbestos dust required protection.
- The defender had failed to take any steps to negate or reduce the deceased's exposure.
- The defender was in breach of section 63(1) and their duties under the common law.

Gibson v Babcock International Ltd

- Lady Carmichael – judgment dated 25 July 2018
- Deceased died of mesothelioma
- Secondary Victim
- Exposure as a result of asbestos on her late husband's working clothes.
- Deceased's husband had been employed by the defenders as an engineer fitter between 1962 and 1971.

- Deceased had not been exposed to asbestos in her own employment
- The risk of injury was reasonably foreseeable to the defenders from 31 October 1965 at the latest.
- The defenders ought reasonably to have foreseen that a risk of injury arose to persons in the position of the deceased by reason of their employees transporting asbestos dust home on their clothing by that date.

- Negligence
- In order to establish negligence, the pursuers would have to prove (i) that the deceased's husband was exposed to asbestos to an extent such that the defenders had to have known that he would take dust containing asbestos fibres home on his clothes, (ii) that the defenders had failed to reduce the risk to the deceased to the greatest extent possible.
- Causation
- The pursuers would require to prove that the deceased's exposure to asbestos from her husband's work clothes materially increased the risk of her developing mesothelioma.

- The defenders had failed to reduce the risk to the deceased where there was no safe, known level of exposure and once it was appreciated that there was a risk to persons in her position, the duty was to reduce that risk to the lowest level practicable
- They failed to do so.
- Pursuers were successful.

- “I do not regard the presence or absence of evidence about the actual level of exposure of the deceased as of particular significance in considering negligence. As I have said, it will be impossible to produce more than informed speculation as to the level, and I do not regard a finding as crucial to establishing liability” (para 166).
- Observations on the nature of the evidence and how it should be utilised and presented
- Any data produced had to be able to be scrutinised and a witness should not simply present a figure taken from the court report of another litigation; in relation to causation, an estimate of exposure was of some use in that the court required to consider whether the exposure materially increased the risk of developing mesothelioma (Paras 166 -167).

PRESCOTT v UNIVERSITY OF ST ANDREWS [2016] CSOH 3

- Lord Pentland – 13 January 2016
- In order for the pursuer to succeed in establishing negligence against the defenders he must establish, on the balance of probabilities, the actual level of asbestos dust to which he was exposed. It is essential for the actual level of exposure to be proved because otherwise the court cannot decide whether the exposure was more than *de minimis* , in which case liability could not arise…To paraphrase what Aikens LJ said in *Williams v University of Birmingham [2012] PIQR P4* at paragraph 41, to determine that question the court has to make findings about (1) the actual level of asbestos fibres to which the pursuer was exposed; (2) what knowledge the defenders should have had at the time about the risks posed by that level of exposure; (3) whether, with that knowledge, it should have been reasonably foreseeable to the defenders that such an exposure level was likely to cause asbestos-related injury;

- (4) what steps the defenders should have taken in the light of the pursuer's exposure to asbestos; and (5) whether the defenders negligently failed to take those steps. It follows from this analysis that the central issue in the present case, had I accepted the pursuer as a reliable witness, would have been the likely level of his actual exposure to asbestos. Without knowing the actual level of asbestos exposure, it is impossible to reach any view as to what the defenders should have known, what they should have foreseen, what steps they should have taken and whether they were negligent." [Para 64].

Watt v Lend Lease Construction (Europe) Ltd. 2022 S.L.T. 723

- Lord Uist - Judgment dated 03 March 2022
- Deceased died of mesothelioma
- Deceased joiner exposed to asbestos between January and June 1963 but on the evidence such exposure was only over a few days.
- Secondary, intermittent and low-level exposure.
- Over a period of only 3 or 4 days.

- Accepted that the deceased died of mesothelioma due to his exposure to asbestos dust while in the employment of the defenders.
- That causal link was established.
- Defenders had taken no steps to prevent injury to deceased arising out of his exposure to asbestos dust.

BUT

Paras [16] and [21] of the Judgment

- Issue was one "of foreseeability".
- "the pursuers required to prove that it was or ought to have been reasonably foreseeable to the defenders at the material time that the exposure to asbestos to which Mr Watt was subjected gave rise to the risk of asbestos-related injury."
- "In my view it is not necessary, in order to determine that issue, that I should make a finding of the degree of exposure in terms of fibres/ml. The defenders were not aware of the degree of exposure in terms of fibres/ml."
- Adopted Swift J's approach in *Abraham* – light and intermittent/modest and infrequent
- On the expert evident was only after 1965 Newhouse and Thomson paper at earliest that employers could have been aware that asbestos exposure at the level to which deceased was subjected gave rise to the risk of injury.
- Accordingly:

- “I therefore do not accept that during the period of Mr Watt's employment with them Bovis should have appreciated that he was at risk of asbestos-related injury and that their failure to do so and to take appropriate precautions for his safety was negligent. It follows that Bovis could not have been aware that the asbestos dust was "likely to be injurious" to him in terms of Regulation. Further, as they did not know, and cannot reasonably have been expected to have known of the risk of injury arising from his exposure to the dust it cannot have been reasonably practicable for them to have taken any steps to protect him from it.”
- Accordingly, Preferring the expert evidence led on behalf of the defenders, the Lord Ordinary held that in 1963 Mr Watt's employers could not be expected to have appreciated that the low level of exposure during those few days involved a risk of asbestos- related injury, thus the pursuers' action failed. The Defenders were assoilzied.

APPEALED TO INNER HOUSE

- Second Division Decision issued 21 April 2023.
- 13. "Having considered the evidence of Mr Howie and Professor Willey…". The Lord Ordinary concluded that "it was not until after the publication of the Newhouse and Thomson paper in 1965 at the earliest that employers could have been aware that asbestos exposure at the level to which Mr Watt was subjected gave rise to the risk of injury". He plainly decided the case according to the evidence before him, and in particular by reference to his preference for that of Professor Willey on the key issues. We see no proper basis to fault his decision in this regard. Whether Swift J made any error of fact in *Abraham* is beside the point: the Lord Ordinary not having fallen into the trap of adopting the factual basis of that case cannot be said to have adopted any error in this case.
- Reclaiming Motion refused.

CONCLUSION

- Watt does not mean all pre-1965 low level exposure cases are bound to fail.
- Each case must depend on its' own facts and circumstances.
- Crucial Importance of evidence of exposure.
- As much DETAIL as possible of exposure.
- Precognitions crucial.
- Importance of Expert Evidence.

Hand Arm Vibration Syndrome

- Lambert v Proserve UK Ltd. [2019] Rep. L.R 124; 2019 SC Edin 72
- ASPIC - Sheriff Braid 30 April 2019

Noise Induced Hearing Loss

- Heasel McDonald v Indigo SunRetail Limited [2021] SC EDIN 20; 2021 S.C.L.R. 269
- ASPIC - First Instance: Sheriff Mundy March 2021
- Sheriff Appeal Court – April 2022 [2022] SAC (CIV) 15

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