IN CONFIDENCE

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The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) to the Judge by email so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

Case No: HQ16A02651

IN THE HIGH COURT OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2017

Before:

HH JUDGE YELTON (sitting as a Judge of the High Court)

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Between:

VERONICA ANN BUSSEY	**CLAIMANT**
- and -	
ANGLIA HEATING LTD.	**DEFENDANT**

- -
- -

Michael Rawlinson QC and Gemma Scott (instructed by **Fieldfisher LLP**) for the Claimant
Charles Feeny (instructed by **Plexus Law, Evesham**) for the Defendant

Hearing dates: 26 and 27 April 2017

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APPROVED JUDGMENT FOR HANDING DOWN

If this draft Judgment has been emailed to you it is to be treated as 'read-only'.
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HH Judge Yelton:

1. I have before me a claim for damages brought by Mrs. V.A. Bussey as widow and executrix of the estate of her late husband Mr. D.E.A. Bussey ("the deceased") against one of his former employers, who are first defendants in the action. When he worked for the first defendants, they were known as Anglia Heating Ltd., but subsequently that company was struck off the Register and was restored only so that this litigation could be brought against it. It now has a numerical description only, but for clarity I shall refer to it by its former title.

2. The deceased was born on 14 November 1944 and lived all his life in Norwich. He left school in 1960 and began working as an apprentice plumber with a company which has not been sued. In 1965 he went to work with the first defendants and continued with them until about 1968. He then had a period of self-employment but in about 1969/70 he went to work for Pump Maintenance Ltd., who are the second defendants in the action. He stayed with them until about 1980 and then worked for about 20 years for Anglia Television Ltd., also as a plumber.

3. In 2015 the deceased developed mesothelioma and he died of that condition on 27 January 2016.

4. The claimant, the widow of the deceased, commenced proceedings on 26 July 2016 against Anglia Heating and Pump Maintenance. She asserted that the death of the deceased, and

the pain and suffering which he underwent after 2015, was caused by the negligence or breach of statutory duty of the two named defendants. Her case is that the claimant developed mesothelioma as a consequence of being brought into contact with asbestos during his work with them.

5. It is not asserted by the claimant that he was in contact with asbestos during his short period of self-employment nor during his lengthy employment with Anglia Television. It is said that he was in contact with asbestos while working for his first employers, but they were not joined in the action.

6. The particular difficulties in relation to actions resulting from the development of mesothelioma caused Parliament to enact s3 of the Compensation Act 2006. That provides that where

> (a) a person ("the responsible person") has negligently or in breach of statutory duty caused or permitted another person ("the victim") to be exposed to asbestos;
>
> (b) the victim has contracted mesothelioma as a result of exposure to asbestos;
>
> (c) …it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another

exposure which caused the victim to become ill; and

(d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a) in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason),

then the responsible person shall be liable in respect of the whole of the damage caused to the victim by the disease, irrespective of whether the victim was also exposed to asbestos by a third party, or by the responsible person in circumstances where that person has no liability in tort.

7. The provisions of that Act apply only to causation. They do not affect the question of how and in what circumstances liability can be found and it is regrettable perhaps that the opportunity was not taken to set out the position in respect of liability with clarity in the statute.

8. The terms of the Act are of some importance to the background of this case in that shortly before the trial the claimant settled the proceedings as against Pump Maintenance Ltd. It was common ground that she could continue against Anglia Heating,

and that as against them, if the action were successful she could recover the whole of her claim but would then have to give credit for sums already received from the other defendant. I draw no inference against the first defendants from the settlement of the claim by the second defendants, to whom different considerations apply. The period of employment was later and the exposure to asbestos is said to have been more frequent.

9. Quantum in this case is agreed and I have only to decide the issue of liability.

10. Both counsel are specialists within this field and have been instructed in a number of reported cases, although not apparently on opposite sides before this matter. I was grateful to them both for the assistance they gave in what is not an easy case. The fact that there are so many reported cases on the subject means however that this judgment can be shorter than would otherwise be the position, as many of the documents in relation to knowledge of the situation as far as asbestos is concerned have been set out and commented upon in other cases.

11. I also accept the general exposition of the development of mesothelioma set out in the decision of Aikens LJ in Williams v

University of Birmingham [2012] EWCA Civ 1242 at paragraphs 23 and following and I shall not repeat those matters here.

12. It is also the case that the information in relation to the deceased's work is somewhat scanty and no doubt he himself had difficulty in recalling the details from more than 40 years before. He made three statements before his death, which I have of course read carefully. He also spoke to the expert instructed by the claimant, Mr. D. Brady, whose evidence on that narrow issue I accept and come to later. The claimant herself was not called to give evidence and neither side had traced or called those who ran the first defendant or any one who worked there with the deceased. The only oral evidence was from the two experts, Mr. Brady and Mr. G. Glenn, for the defendants, and their evidence had to involve a certain amount of conjecture.

13. The experts agree (p165 Core Bundle, paragraph 9) that "the deceased's employment with [Anglia Heating] would have post-dated knowledge of the risks of mesothelioma and that exposure to relatively small quantities of asbestos dust (and in particular exposure to crocidolite [blue asbestos]) was potentially harmful".

14. I am satisfied on the balance of probabilities having read the evidence of the deceased and listened to the commentaries upon it by the experts that:

(1) The defendants were at the material time a substantial firm of domestic plumbers in the Norwich area and indeed the largest such business. That of course is very different from being part of a multi-national company.

(2) During his employment with the defendants the claimant was mostly employed in domestic heating and plumbing work.

(3) The deceased's exposure to asbestos during this employment came from cutting asbestos cement pipes, usually flue pipes from a boiler or a gas fire, with a hacksaw and also from handling asbestos rope, from which a length was teased out, and then used to caulk joints on the new flue pipes. The pipes had a diameter of 4 to 6 inches and the asbestos used was almost always chrysotile (white asbestos), the most commonly found type and the least toxic. The deceased did not carry out lagging or insulation work in the course of his employment.

(4) The deceased's own estimate was that this cutting and caulking occurred about once every two to three weeks, and I accept that.

(5) Dust was produced from the cutting. The dust was not all from the asbestos and much of it (Mr. Brady thinks about 85 to 90%) was from the cement used in the pipes. There could

be three or four cuts in relation to each flue and each cut would take about 5 minutes.

(6) Some dust went on to the deceased's clothes. After carrying out this work he would blow on the cut end of the pipe, and later sweep up, which produced visible dust as it was done.

(7) The asbestos rope (which in his earlier statements the deceased describes as "string", which is a misleading term) was dusty and some of the dust came off on to his hands. It is on this point that I accept the evidence of Mr. Brady, who had spoken to the deceased about it. Rope of this type often contained amosite (brown asbestos) as well as the more common and less toxic chrysotile.

(8) During his employment with the first defendants, the deceased was not given any advice about reducing exposure to asbestos dust.

(9) It was exposure to asbestos which caused the claimant to develop mesothelioma.

15. I was also invited to make findings about the levels of the claimant's exposure to asbestos dust during his work. Mr. Brady thought (Core Bundle, p67) that hand sawing was likely to produce asbestos levels of 2 to 4 fibres/ml. He thought that the sawing itself would take about 5 minutes, and there may be

three or four cuts per job, or about 20 minutes exposure from cutting.

16. He was then asked about the levels from the rope and his reply was that it was "anyone's guess". He finally came to the figure of 10 fibres/ml, which was calculated by taking a very small percentage of that found in a well known paper on the use of asbestos lagging in ships being repaired in Devonport Dockyard, where the level was in excess of 118. I am not satisfied that I can take the figure here as being as high as 10 and I do not think that comparison between the deceased's circumstances and those prevailing in the Navy dockyard are at all helpful. I am not satisfied that the exposure from rope would be greater than that from cutting, but the information available is very limited. Again, I would estimate that 20 to 30 minutes per job would be an appropriate figure to take.

17. Mr. Brady was then asked about the level caused by sweeping and thought that might be as high as 100 fibres/ml. This is not in his report but is in the joint statement and was confirmed by him in the course of oral evidence.

18. Mr. Glenn did not agree with those figures. He was criticised by Mr. Rawlinson QC as being partial, and that criticism may have some force in so far as his selective use of quotations is concerned, but I am satisfied that both of the experts were doing

their best to assist the court as to the levels of asbestos, on which the information from which they had to work was very sparse.

19. Mr. Glenn thought that the levels here were very low. He also thought that much of the pipe cutting may have taken place outside. I am unable to make any finding about that particular aspect. He thought the dust from sweeping would produce a similar result in the atmosphere to that from cutting. I think he was correct about that and that Mr. Brady's view that it was anything like as high as 100 is not sustainable. Sweeping took place after a job which involved cutting and seems unlikely to have taken more than a few minutes.

20. I also bear in mind that the exposure to asbestos in this case was very limited in time. On the basis that the deceased was involved in the cutting of flue pipes once every two or three weeks, his involvement with the dust was not in my judgment substantial although not de minimis. On the figures set out above (which can only be estimates) the deceased was exposed to asbestos dust for up to an hour once every two to three weeks.

21. Mr. Rawlinson QC relied on the fact that he had the rope with him in his vehicle and that he carried the pipes into the building where he would be working, but I do not regard those matters

as of any significance. It seems to me that his exposure in those circumstances was likely to be minimal and, particularly in the case of pipes which had not been cut, of little or no importance. The carrying of rope in a van in this employment (as opposed to the employment with Pump Maintenance Ltd.) is not the subject of any evidence at all from the deceased and it would be wrong to conjecture about. He did draw attention to the fact that the rope had to be carried from the van on to the site but there si no indication that that was done other than when it was required, namely every two or three weeks.

22. I was referred to a very substantial body of documentation in relation to the development of knowledge of the risks from asbestos dust. I do not intend to set out all the relevant literature in this judgment, not least because most (although, I accept, not all) of it is set out in the Appendix to the decision of the Court of Appeal in Williams v University of Birmingham.

23. It is common ground, and has been so held in other cases to which I turn in a moment, that 1965, or to be more exact October 1965, marked a turning point in relation to knowledge about mesothelioma. As it happens, this coincides with the deceased's commencement of employment with the defendants. The importance of this date is that a paper was published in the *Journal of Industrial Medicine* which set out the link between asbestos exposure and mesothelioma, and this was followed on

31 October 1965 by a well-publicised article in the *Sunday Times* to like effect. In due course, in May 1970, the Asbestos Regulations 1969 came into effect; this was after the deceased's employment with Anglia Heating had come to an end.

24. In March 1970 the Factory Inspectorate issued Technical Data Note (TDN) 13, which gave guidance on the concentration of asbestos dust which was likely to lead to prosecution. Apart from crocidolite, which was effectively given a zero tolerance but which has no reference to this case, levels were given for the other types of asbestos, which would later and now be regarded as far too high.

25. I am not satisfied on the balance of probabilities that the deceased was exposed to levels of asbestos dust beyond those set out in TDN 13, which of course had in any event not been published at the time when he was working for the defendants. The methods of calculating the levels are not easy to reconcile, but I have already set out my findings in relation to the evidence of the experts. TDN 13 as I have understood the situation laid down levels of 12 fibres/ml for a TWA (time weighted average) of 10 minutes and 2 fibres/ml for a TWA of four hours. The time for which the deceased would have been exposed was short, as earlier set out, and the exposure at a low level.

26. I now turn to the authorities. Mr. Rawlinson QC made the bold suggestion that the decision of the Court of Appeal in Williams was reached per incuriam and that I should not follow it. This was a robust submission to make, particularly as it is clear that it has been followed at first instance in a number of cases.

27. The first mesothelioma case to come before the Court of Appeal appears to have been Jeromson v Shell Tankers [2001] ICR 1203. Hale LJ delivered the reasoned judgment of the court and held that Shell were in breach of the duty owed by them to their employee, the claimant, in failing to provide a safe system of work. The claimant in that litigation was employed by Shell prior to 1965, and was required to work in confined spaces containing a great deal of asbestos. It was held that the employer should have taken precautions, or at the very least made enquiries about how precautions could be taken. Hale LJ said at p1239G that "There is no reassurance to be found in the literature that the level of exposure found by the judge in this case was safe and much to suggest that it might well not be so".

28. The issues were again considered by the Court of Appeal in Maguire v Harland and Wolff plc [2005] EWCA Civ 1. This case concerned the wife of a boilermaker in a shipyard, whom it was asserted had died as a result of contact with her husband's work clothes between 1961 and 1965. Judge LJ held that it was not possible to hold that Harland and Wolff had failed to

address a risk, which had not been identified or addressed by anyone else within or without the industry, namely that of secondary contamination. The claim was dismissed. However it is interesting that at paragraph 91 Longmore LJ held that after Jeromson the Court of Appeal was bound to proceed on the basis as between employer and employee that the employer will be in breach of duty if he failed to reduce his employee's exposure "to the greatest extent possible", reading possible as "practicable". That of course relates to pre-1965 periods.

29. There is no doubt that in this case the exposure could have been reduced by, for example, ensuring that a respirator or the like was worn or even by making all cutting of asbestos cement and all caulking take place outside.

30. I was next referred to a decision of HH Judge Hickinbottom, as he then was, in Jones v Metal Box Ltd. which was given in Cardiff County Court on 11 January 2007. The importance of this case is that the deceased was an employee and was employed by the defendants after 1965 and until about 1968: in other words over the same period as covered in the instant case. The Judge held (at paragraph 72) that after the publication of the *Sunday Times* article, the defendants were on notice of the fact that if any of their employees were exposed to even very low levels of asbestos they were at risk of contracting mesothelioma.

31. The decision of Swift J. in Abraham v Ireson and others [2009] EWHC 1958 also has some similarities to the instant case, in that the claimant worked as a plumber for a period ending in 1965. The Judge found that he suffered mesothelioma as a consequence of that employment but that an employer would not have regarded him as being liable to asbestos-related injury, because of the low level of exposure, lower in fact that Mr. Bussey had.

32. I was next referred to Asmussen v Filtrona United Kingdom Ltd., a decision of Simon J. given on 6 July 2011. In that case the Judge found that the claimant had inhaled asbestos fibres in a factory owned by the defendants between 1955 and 1960, as a result of work being carried out to lagging. He found that the employers could not have foreseen the injury caused to the claimant because its failure to take specific steps to reduce the risk of that occurring had to be seen in the context of knowledge at that time.

33. I now turn to the decision in Williams, of which Mr Rawlinson was so critical. That was a case involving a student at the defendant University, who was therefore not an employee, and who came into contact with asbestos in the course of physics experiments between 1970 and 1974. The defendant's appeal against the first instance Judge's decision was allowed on the basis that the issue had not properly been addressed. The

correct legal test for breach of duty, where there was more than de minimis exposure, was whether the degree of actual exposure made it reasonably foreseeable to the defendant that as a result of its conduct the respondent would be exposed to the risk of contracting mesothelioma and that was to be based on its knowledge in 1974.

34. Aikens LJ held that the best guide to what in 1974 was an acceptable or unacceptable level of exposure to asbestos generally was that set out in TDN 13 of 1970. It is that observation to which Mr. Rawlinson QC objects.

35. It is clear that in order to succeed, Mrs. Bussey must be able to show on the balance of probabilities that it was reasonably foreseeable to the defendant that her husband could contract mesothelioma, based on knowledge at the time. Counsel complains about the Court of Appeal's formulation of the test of reasonable foreseeability, not about the need for the test itself.

36. Williams was applied by David Pittaway QC sitting as a Judge of the High Court in Macarthy and McCoy v Marks & Spencer plc and another, a judgment given on 8 October 2014. The claimant was not the employee of the defendants, but carried out work in their store in circumstances in which asbestos dust was released into the atmosphere. The Judge held that it was not reasonably foreseeable to the defendant that the presence of

asbestos dust was likely to be injurious to the health of other contractors on site who came into contact with it, certainly not in the low quantities which were involved.

37. In Hill and Billingham v John Barnsley & Sons [2013] EWHC 520 Bean J. held that Williams was binding on him, but that on the facts of the case he was deciding the claimant should succeed, as the levels of asbestos dust exceeded those set out in TDN 13.

38. Williams was also followed by HH Judge Platts, sitting as a High Court Judge in the case of Woodward v Secretary of State for Energy and Climate Change. Judgment was given on 9 November 2015. In that case the claimant's wife had been employed by the National Coal Board, the predecessors of the defendant, for a period after the publication of TDN 13. He held (paragraph 76) that the claimant could only succeed if he could prove on the balance of probabilities that the TDN 13 levels of exposure were exceeded, which he held he could not do.

39. The last case to which I was referred was the decision of HH Judge Curran QC in the High Court on 22 April 2016 in the case of Smith v Portswood House Ltd. In that case the deceased had worked for the defendants from about 1973 until 1977. The Judge set out all the cases from Williams onwards. It was common ground between the parties, as recorded by the Judge

in paragraph 122 of his judgment, that the court was bound by Williams to the extent that TDN 13 was the relevant standard by which foreseeability of injury was to be judged.

40. In the case which is before me, the exposure to asbestos preceded TDN 13. However it would in my judgment be perverse to find that TDN 13 increased rather than decreased the levels of exposure which a responsible employer would regard as safe. In other words, if the decision in Williams is correct, then a claimant cannot succeed in a claim of this nature in relation to a period before 1970 by showing that exposure to asbestos was at a lower level than provided by TDN 13.

41. Mr. Rawlinson's argument that I should not follow Williams because it was a decision reached per incuriam is not it seems to me one that I could properly accede to. The doctrine of precedent was recently restated by the Supreme Court in Willers v Joyce [2016] UKSC 44. Lord Neuberger, giving the judgment of the court, said in paragraph 8 that the Court of Appeal is bound by its own previous decisions unless satisfied that one of those decisions was given per incuriam. That Court can depart from such a decision, but in paragraphs 5 and 9 he points out that High Court Judges are bound by decisions of the Court of Appeal and if there are two inconsistent decisions, the later should be followed. He also made it clear in paragraph 9 that first instance Judges are not technically bound by a decision of

their peers but "should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so". That applies in this case to the High Court cases which have followed Williams.

42. More fundamentally, a first instance Judge cannot hold that a Court of Appeal decision was reached per incuriam. That is a matter for that Court.

43. It seems to me that if Mr. Rawlinson seeks to argue that that case was wrongly decided, he has to put that argument to the Court of Appeal or the Supreme Court.

44. Having concluded that the claimant has failed to prove that the levels of the deceased's exposure to asbestos exceeded those set out in TDN 13 (although they were not de minimis), it seems to me that I am bound by the logic of Williams to hold that she has failed to prove that the first defendants were negligent. There is nothing in Mr. Rawlinson's submission that that case does not apply to employees because the claimant in Woodward and the deceased in Smith had been employees of the respective defendants.

45. It follows that for the reasons set out the claim must be dismissed.

46. I emphasise that the reason why this judgment is shorter than many on the subject is that, apart from wishing to follow the

encouragement of the Court of Appeal to produce concise reasoning, the background is very fully set out in many other recent cases and need not be repeated here.