Neutral Citation Number: [2018] EWCA Civ 243

Case No: B3/2017/1541

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
HH JUDGE YELTON
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2018

Before :

LORD JUSTICE JACKSON
LORD JUSTICE UNDERHILL
and
LORD JUSTICE MOYLAN

- -

Between :

Veronica Bussey (widow and executrix of the Estate of David Edwin Anthony Bussey)	**Appellant**
- and -	
00654701 Limited (formerly Anglia Heating Limited)	**Respondent**

- -
- -

Michael Rawlinson QC and Gemma Scott (instructed by **Fieldfisher LLP**) for the **Appellant**
Charles Feeny (instructed by **Plexus Law**) for the **Respondent**

Hearing date: 23rd January 2018

- -

Approved Judgment

Lord Justice Jackson:

1. This judgment is in six parts, namely:

Part 1 – Introduction	Paragraphs 2 - 9
Part 2 – The facts	Paragraphs 10 – 14
Part 3 – The present proceedings	Paragraphs 15 – 23
Part 4 – The appeal to the Court of Appeal	Paragraphs 24 – 28
Part 5 – The Law	Paragraphs 29 – 39
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Part 1 – Introduction

2. This is an appeal by the widow of a man who died from mesothelioma against the dismissal of her fatal accident claim. The defendant/respondent employed the deceased between 1965 and 1968. The issue in this appeal is whether, given the relatively low level of exposure to asbestos and the state of knowledge in the late 1960s, the defendant was under a duty to take protective measures.

3. Mrs Veronica Bussey, the widow and executrix of David Bussey, is claimant in the action and appellant in this court. 00654701 Limited, formerly known as Anglia Heating Limited, is first defendant in the action and respondent in this court. I shall refer to that company as "Anglia".

4. A company called Avery Way Tronix Limited was second defendant in the action until April 2017. I shall refer to that company as "Avery".

5. There are three principal types of asbestos. They are chrysotile (least likely to cause mesothelioma), amosite (medium risk) and crocidolite (most likely to cause mesothelioma). The present case is concerned with chrysotile and amosite.

6. The Asbestos Regulations 1969 came into force in May 1970. Regulation 7 and 8 provide:

> "*Exhaust ventilation*
>
> 7.–(1) Subject to the provisions of the next following Regulation, no process to which these Regulations apply shall

be carried on in any factory unless equipment is provided, maintained and used which produces an exhaust draught which prevents the entry into the air of any workplace of asbestos dust:

Provided that the foregoing requirements of this Regulation shall not apply where any such process is carried on in such a manner as to be as safe as it would be if the said requirements were complied with.

(2) Exhaust ventilation equipment provided in accordance with this Regulation shall while any work of maintenance or repair to the machinery, apparatus or other plant or equipment in connection with which it is provided is being carried on, be kept in use so as to produce an exhaust draught which prevents the entry into the air of any workplace of asbestos dust.

(3) Exhaust ventilation equipment provided in accordance with this Regulation shall be inspected at least once in every seven days and shall be thoroughly examined and tested by a competent person at least once in every period of fourteen months, and a report of the results of every such examination and test containing approved particulars and signed by the person making or responsible for the carrying out of the examination and test shall be made within fourteen days after the examination and test.

(4) Every such report as aforesaid shall be attached to the general register and be preserved and kept available for inspection by any inspector for a period of two years after it is made.

Protective equipment

8.– (1) Where in any factory the requirements of paragraph (1) or (2) of the last foregoing Regulation apply, but it is impracticable to comply with those requirements, there shall be provided for the use of each person employed in any part of the factory, being a part into which asbestos dust from a process to which these Regulations apply is liable to escape–

(a) approved respiratory protective equipment; and

(b) protective clothing.

(2) All respiratory protective equipment and protective clothing provided in pursuance of the foregoing paragraph of this Regulation shall be maintained.

(3) All respiratory protective equipment and protective clothing so provided shall be used by persons for whom they are provided while employed in any such part of the factory as aforesaid.

> (4) No respiratory protective equipment so provided which has been worn by a person shall be provided for the use of another person unless it has been thoroughly cleaned and disinfected since last being worn.
>
> (5) No person shall be employed to perform any work for which respiratory protective equipment is provided in pursuance of this Regulation unless he has been fully instructed in the proper use of that equipment."

7. In 1970 HM Factory Inspectorate published Technical Data Note 13 ("TDN13"), which was entitled "Standards for asbestos dust concentration for use with the Asbestos Regulations 1969". The first section of TDN13 reads as follows:

> "In this note guidance is given on how HM Inspectors of Factories will interpret the expression 'dust consisting of or containing asbestos to such an extent as is liable to cause danger to the health of employed persons' and how the measurements may be made. It is emphasised that these notes have been prepared for the guidance of HM Inspectors since only the Courts can give binding decisions in these matters. It is important to bear in mind that these standards are provisional and may have to be revised from time to time.
>
> *Chrysotile, amosite and fibrous anthophyllite*
>
> (a) Where the average concentration of asbestos dust over any 10 minute sampling is less than 2 fibres/cc or 0-1 mg/m^5, HM Factory Inspectorate will not seek to enforce the substantive provisions of the Regulations, in particular regulations 7 and 8. Where the concentration is 2 fibres/cc or 0.6 mg/m^5 or more (but not more than 12 fibres/cc or 0.6 mg/$m^{5)}$ further sampling over a four hour period will be carried out to determine whether the average concentration of asbestos dust still exceeds 2 fibres/cc or 0.1 mg/m^5.
>
> (b) Where the average concentration of asbestos dust over a four hour sampling period is 2 fibres/cc or 0.1 mg/m^5 or more the extent to which HM Factory Inspectorate will require the standard of control to be improved will depend upon the amount by which it exceeds 2 fibres/cc or 0.1 mg/m^5 and the duration of exposure.
>
> (c) When the average concentration of asbestos dust over any 10 minute period exceeds 12 fibres/cc or 0.6 mg/$m^{5,}$ Inspectors will normally seek to confirm or otherwise the accuracy of the test by means of a further sample before taking action to enforce regulations 7 or 8 whichever is appropriate."

8. In this judgment I shall use the abbreviation "TWA" for time weighted average.

9. After these introductory remarks I must now turn to the facts.

Part 2 – The Facts

10. Mr David Bussey was born on 14 November 1944. Throughout his adult life he lived in the Norwich area and worked as a plumber.

11. Between 1965 and 1968 Mr Bussey worked for Anglia. That company was the largest plumbing business in Norwich. Much of Anglia's business consisted of installing or repairing central heating systems and boilers. That work brought Mr Bussey into contact with asbestos on occasions. In particular, he cut through asbestos cement pipes with a hacksaw. On each job he spent about 20 minutes doing this. That amounted to about one hour every two or three weeks. The process of cutting generated white asbestos (chrysotile) dust at a concentration of 2 to 4 fibres/ml. After cutting he would blow the cut end of the pipe and then sweep up. Sweeping up took a few minutes and produced similar levels of asbestos in the atmosphere. In addition, Mr Bussey used asbestos rope for caulking joints. This task took about 20 to 30 minutes per job and produced asbestos dust at a concentration of 2 to 4 fibres/ml. The rope contained both white asbestos (chrysotile) and brown asbestos (amosite).

12. After leaving Anglia, Mr Bussey was self-employed for a period. After that, between 1969/1970 and 1980, he worked for Avery. His exposure to asbestos was greater during that period than when he was with Anglia. After 1980 Mr Bussey worked for Anglia Television until he retired, but he was not exposed to asbestos during that employment.

13. In February 2015 Mr Bussey developed mesothelioma. This was devastating for him and his family. His pain and suffering gradually increased over the following year. He died on 27 January 2016.

14. Following Mr Bussey's death, his widow commenced the present proceedings.

Part 3 – The Present Proceedings

15. By a claim form issued on 26 June 2016 the claimant claimed damages under the Fatal Accident Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 against both Anglia and Avery. In due course Avery reached a settlement with the claimant, paying £150,000 damages and appropriate costs.

16. Following that settlement the claimant pressed on against Anglia alone. The parties agreed the quantum of the claimant's claim against Anglia at £65,000 plus costs.

17. In relation to liability, the claimant relied upon three witness statements which Mr Bussey had made before his death. She also relied upon the expert evidence of David Brady. Anglia relied upon the expert evidence of Graham Glenn. Both Mr Brady and Mr Glenn are engineers with appropriate experience to assist the court in this case.

18. A consultant physician, Dr Rudd, provided an expert report about the relationship between asbestos and mesothelioma. That report was uncontroversial. It went before the court without any cross-examination of Dr Rudd.

19. Dr Rudd's report includes the following passage:

> "Mesothelioma can occur after low level asbestos exposure and there is no threshold dose of asbestos below which there is no risk. However, the risk that mesothelioma will occur increases in proportion to the dose of asbestos received and successive periods of exposure each augment the risk that mesothelioma will occur.
>
> There is on average, a long latent interval between first exposure to asbestos and the onset of clinical manifestations of mesothelioma, more than 30 years in most series, but the range of intervals is large, extending down to ten years and perhaps less in rare cases, and upwards with no upper limit. The latent interval between first exposure and the onset of clinical manifestations should not be confused with the interval between commencement of the growth of the tumour from the first cell and the onset of clinical manifestations. The latter period is usually much shorter than the former because the mesothelioma does not start to grow as soon as the first fibres are inhaled but after a period of years during which repeated interactions between asbestos fibres and mesothelial cells occur, eventually resulting in malignant transformation of a mesothelial cell. It is at this point that the tumour starts to grow. Initially growth of the tumour is not dependent upon growth of new blood vessels, a process known as angiogenesis, but eventually this is necessary for growth of the tumour to continue so that it may eventually become clinically manifest."

20. This action came on for trial before HH Judge Yelton, sitting as a deputy High Court judge on 26 and 27 April 2017. Mr Brady and Mr Glenn gave oral evidence and were cross-examined. There was no other oral evidence.

21. The judge handed down his reserved judgment on 11 May 2017. He made findings about Mr Bussey's exposure to asbestos as set out in Part 2 above. He dismissed the claimant's claim.

22. I would summarise the judge's reasoning as follows:

    i) Exposure to asbestos dust caused Mr Bussey to develop mesothelioma

    ii) Mr Bussey did not receive any advice from Anglia about reducing his exposure to asbestos dust.

    iii) 1965, the year Mr Bussey started working for Anglia, marked a turning point in knowledge about mesothelioma. A paper was published in the Journal of Industrial Medicine about the link between asbestos exposure and mesothelioma. This was followed by an article in the Sunday Times to the same effect.

    iv) On balance of probabilities, Mr Bussey was not exposed to levels of asbestos dust beyond those set out in TDN13. This laid down levels of 12 fibres/ml for

a TWA of 10 minutes or 2 fibres/ml for a TWA of 4 hours. Those levels would now be regarded as far too high.

v) In order to succeed, the claimant must prove on balance of probabilities that it was reasonably foreseeable by Anglia at the time that Mr Bussey could contract mesothelioma from the asbestos dust to which he was being exposed.

vi) If Anglia had foreseen the risks, they could have reduced Mr Bussey's exposure to asbestos by requiring him to wear a respirator or to carry out his work outside.

vii) The Court of Appeal held in *Williams v University of Birmingham* [2011] EWCA Civ 1242 that in relation to a period before 1970 the claimant could not succeed if his exposure to asbestos was below that provided in TDN 13.

viii) *Williams* cannot be distinguished. It is not open to the judge to treat *Williams* as decided *per incuriam*.

ix) Therefore the claimant's claim fails.

23. The claimant was aggrieved by the decision of the judge, accordingly she appealed to the Court of Appeal.

Part 4 – The Appeal to the Court of Appeal

24. By an appellant's notice filed on 1 June 2017 the claimant appealed to the Court of Appeal on two grounds. It is only necessary to deal with the first ground, as the court has refused permission to appeal on the second ground.

25. I would summarise the claimant's case on appeal as follows:

i) *Williams* was decided *per incuriam* because earlier relevant authorities were not cited to the court.

ii) Alternatively *Williams* should be distinguished because that case concerned a lawful visitor, rather than an employee.

iii) On the evidence, in the period 1965 to 1968 it was reasonably foreseeable that exposure to the levels of asbestos at issue in this case could cause mesothelioma. Insofar as *Williams* holds otherwise, it was wrongly decided.

iv) In any event Mr Bussey's employment with Anglia preceded the publication of TDN13. That Technical Data Note cannot be the touchstone test for breach in respect of any period before 1970.

26. The respondent takes issue with each of those contentions. Anglia contends that *Williams* was correctly decided; the judge applied the correct test and he reached the correct conclusion.

27. The appeal was heard on 23 January 2018. Mr Michael Rawlinson QC, leading Ms Gemma Scott, appeared for the claimant\appellant. Mr Charles Feeny appeared for the respondent/defendant. I am grateful to all counsel for their assistance.

28. Before grappling with the issues I must first review the law.

Part 5 – The Law

29. What is the duty of an employer in an area where knowledge is developing? Swanwick J answered that question in S*tokes v Guest Keen and Nettlefold* [1968] 1 WLR 1776 at 1783:

> "From these authorities I deduce the principles, that 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 as recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

30. That passage has often been cited with approval. In *Thompson v Smith's Ship Repairers* [1984] 1 QB 405 at 415-6 Mustill J set out that passage and added:

> "I shall direct myself in accordance with this succinct and helpful statement of the law, and will make only one additional comment. In the passage just cited, Swanwick J drew a distinction between a recognised practice followed without mishap, and one which in the light of common sense or increased knowledge is clearly bad. The distinction is indeed valid and sufficient for many cases. The two categories are not, however, exhaustive: as the present actions demonstrate. The practice of leaving employees unprotected against excessive noise had never been followed "without mishap." Yet even the plaintiffs have not suggested that it was "clearly bad," in the sense of creating a potential liability in negligence, at any time before the mid-1930s. Between the two extremes 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."

31. In *Jeromson v Shell Tankers UK Limited* [2001] EWCA Civ 100; [2001] ICR 1223 two former employees of Shell developed mesothelioma. They had both been exposed to asbestos while working in the engine rooms of ships, in one case between 1952 and 1957, in the other case between 1957 and 1961. Their widows brought fatal accident claims against Shell. They succeeded at trial. The Court of Appeal dismissed Shell's appeal. Hale LJ gave the leading judgment, with which Mantell LJ and Creswell J agreed.

32. Hale LJ cited the passages from *Stokes* and *Thompson* which I have quoted above. She noted that in the 1950s the known risk from asbestos was asbestosis, not mesothelioma. At [37] she said:

> "However, 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."

33. Hale LJ then reviewed the evidence and the literature. At [52] she said:

> "The point which impressed the judge was the certain knowledge that asbestos dust was dangerous and the absence of any knowledge, and indeed any means of knowledge, about what constituted a safe level of exposure. Mr Mackay's argument relies heavily on the explosion of knowledge which took place during the 1960s. Only then did it become apparent that mesothelioma could result from very limited exposure. In particular, it was only then that knowledge began to develop of the risks to those outside the workplace, such as the wife washing her shipyard worker husband's overalls (as in *Gunn*) or people living near to asbestos works. But just as courts must beware using such later developments to inflate the knowledge which should have been available earlier, they must beware using it to the contrary effect. The fact that other and graver risks emerged later does not detract from the power of what was already known, particularly as it affected employees such as these, working in confined spaces containing a great deal of asbestos which might have to be disturbed at any time. 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. The judge was entitled to conclude that a prudent employer would have taken precautions or at the very least made enquiries about what precautions, if any, they should take."

34. In *Maguire v Harland and Wolff PLC* [2005] EWCA Civ 1; [2005] PIQR P21 the wife of a boiler maker developed mesothelioma as a result of washing her husband's clothes between 1961 and 1965. Her widower succeeded at trial in a fatal accident claim against his former employers. The Court of Appeal reversed that decision. At [57] Judge LJ, with whom Longmore LJ agreed, said:

> "Before 1965 neither the industry generally, nor those responsible for safety and health, nor the Factory Inspectorate, nor the medical profession, suggested that it was necessary, or even that it would be prudent, for risks arising from familial exposure to be addressed by the industry. In truth, the alarm did not sound until late 1965, when it began to be appreciated that there could be no safe or permissible level of exposure, direct or indirect, to asbestos dust. Thereafter, the learning curve about the risks arising from familial exposure was fairly steep. In my judgment, however, Morland J's conclusion that the risk of serious injury to Mrs Maguire's health was "reasonably foreseeable, indeed obvious" to her husband's employers is not sustainable."

35. In his concurring judgment at [91] Longmore LJ stated:

> "In any event in *Jeromson v Shell Tankers UK Ltd* [2001] P.I.Q.R. 19 this court preferred the approach of Buxton J to that of Waterhouse J; in my judgment, we 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 meaning "practicable", the word used in s.47 of the Factories Act 1937."

36. I come now to *Williams v University of Birmingham* [2011] EWCA Civ 1242. The deceased in that case had been exposed to very low levels of asbestos (chrysotile, amosite and crocidolite) between 1970 and 1974 while he was a physics student at Birmingham University. The exposure occurred because he had carried out experiments in a service tunnel where there were heating pipes lagged with asbestos. The claimant's widow succeeded at trial, but failed in the Court of Appeal. Aikens LJ gave the leading judgment, with which Maurice Kay and Patten LJJ agreed. I would summarise Aikens LJ's reasoning as follows:

i) The deceased was exposed to asbestos fibres for between 52 and 78 hours in total. The concentration of asbestos in the atmosphere was close to or just above .1 fibres\ml but less than .2 fibres/ml. See [8] and [43].

ii) The test for negligence in the present case was:

> "Ought the University reasonably to have foreseen the risk of contracting mesothelioma arising from Mr Williams' exposure to asbestos fibres by undertaking the speed of light experiments in the tunnel in the manner contemplated–and done in fact–to the extent that the University should (acting reasonably) have

refused to allow the tests to be done there, or taken further precautions or at the least sought advice."

See [35].

iii) The Supreme Court has reaffirmed in *Baker v Quantum Clothing Group* [2011] UKSC 17; [2011] 1WLR 1003 that the standard of conduct to be expected is that of a reasonable and prudent employer at the time, but taking account of developing knowledge about the particular danger concerned. See [36].

iv) There could only be a breach of the duty of care by the University if "it would have been reasonably foreseeable to a body in the position of the 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." See [60].

v) TDN13 was the best guide to what were acceptable and unacceptable levels of exposure to asbestos in 1974. See [61].

vi) Accordingly, the claimant failed on the issue of foreseeability.

37. Mr Rawlinson makes the point that neither *Jeromson* nor *Maguire* were cited to the Court of Appeal in *Williams*. Mr Feeny (who was counsel in *Williams*) accepts that proposition. He does not accept, however, that the decision was *per incuriam*.

38. There are of course many first instance decisions on foreseeability of the risk of mesothelioma at different dates. Counsel have taken us through several of them. Each one turns upon the circumstances of that case and the expert evidence which was called. I bear those decisions in mind, but do not embark upon a recitation of those authorities.

39. Having reviewed the law, I must now turn to the central issues in this appeal, which are foreseeability and breach.

Part 6 – Foreseeability and breach

40. The quotations from *Stokes* and *Thompson* set out in Part 5 above accurately state the general duty of an employer in relation to developing areas of knowledge, which affect the safety of employees.

41. In relation to mesothelioma Aikens LJ formulated the foreseeability test in paragraphs 35 and 60 of his judgment. I have set out the relevant passages in Part 5 above.

42. Mr Rawlinson criticises Aikens LJ's formulation of the test because it includes the phrase "unacceptable risk of asbestos-related injury". He says that the word "unacceptable" should be omitted.

43. I reject that submission. Anyone who works or lives in proximity to asbestos faces some risk of mesothelioma. It is possible to reduce that risk by taking available precautions. It is not possible to eliminate it altogether. The residual risk or the risk

which remains after taking all proper precautions may be regarded as an "acceptable" risk.

44. In paragraphs 35 and 60 Aikens LJ formulated the foreseeability test with specific reference to the University context and the facts of *Williams.* Let me now adapt Aikens LJ's formulation to the facts of the present case. The foreseeability test for present purposes is this:

> During the period 1965 to 1968 ought Anglia reasonably to have foreseen that if Mr Bussey cut and caulked pipes in the manner set out in Part 2 above, he would be exposed to an unacceptable risk of asbestos-related injury?

45. It follows from the foregoing that, despite Mr Rawlinson's criticisms, the Court of Appeal applied the correct legal principle in *Williams*. I propose to apply precisely the same legal principle in determining the present appeal.

46. As previously noted, in [61] Aikens LJ held that TDN13 was the best guide to what were acceptable and unacceptable levels of exposure in 1974. He was not there formulating a principle of law. He was setting out a mixed finding of fact and law. That finding was based upon the expert evidence adduced in the case before him.

47. In my view TDN13 does not establish a 'bright line' to be applied in all cases arising out of the period 1970 to 1976. Still less is it a bright line to be applied to asbestos exposure in a different period whether before or after 1970 to 1974.

48. At this point in the analysis I regard it as relevant that neither *Jeromson* nor *Maguire* was cited in *Williams*. If Aikens LJ had those two decisions in mind, I do not think that he would have suggested (if indeed he did suggest) that TDN13 was a general yardstick for determining the foreseeability issue.

49. 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 relevant time should have acquired and then to determine what risks such an employer should have foreseen.

50. I hasten to say that I am not criticising the actual decision in *Williams*. The deceased in that case was exposed to very low levels of asbestos for a relatively short time. The total exposure in *Williams* was much lower than the total exposure in the present case. The Court of Appeal very properly took into account the provisions of TDN13 in addition to the expert evidence.

51. I am not, therefore disputing any of the legal principles stated in *Williams*. Nor am I questioning the actual decision reached. The only gloss which, respectfully, I would place on the *Williams* judgment is this. Paragraph 61 should not be read as making TDN13 a universal test of foreseeability in mesothelioma cases.

52. Let me now turn to the present case. Anglia chose to call no evidence as to what information it had about asbestos-related injury in general or mesothelioma in particular during the period 1965 to 1968. All we know is that it was the largest plumbing business in Norwich.

53. The Court of Appeal has held in *Maguire* that alarm bells sounded in late 1965 "when it began to be appreciated that there could be no safe or permissible level of exposure, direct or indirect to asbestos dust".

54. That proposition is aptly borne out by the expert evidence in the present case. Paragraphs 8 to 9 of the experts' joint statement reads:

> "8. The evolving knowledge of the risks associated with asbestos as detailed in our reports are effectively agreed. To summarise, we agree that:
>
> a) From the early 1930s there was knowledge that exposure to substantial quantities of asbestos dust was associated with a risk of developing asbestosis.
>
> b) From the mid-1950s there was knowledge of a risk of developing lung cancer (Dr Hughson will say in 1955 it was identified there was an increased risk of lung cancer in patients with asbestosis).
>
> c) From the mid-1960s there was knowledge that exposure to relatively small quantities of asbestos dust, in particular crocidolite, was associated with a risk of developing mesothelioma. It is generally agreed that this became common knowledge in 1965 following publication of an article by Newhouse and Thompson which received national press coverage."
>
> 9. We agree that the Deceased's employment with the Defendants 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) was potentially harmful."

55. On the judge's findings of fact, the asbestos levels to which Mr Bussey was exposed came close to (but did not exceed) those mentioned in TDN 13. At the time Anglia had no way of measuring the actual level of asbestos to which Mr Bussey was exposed. Nor could Anglia compare those levels to TDN13 (which was not published until some years later). All that Anglia knew, or ought to have known, was that Mr Bussey's work regularly exposed him to small quantities of asbestos dust.

56. The judge has held at paragraph 39 of his judgment that there were two simple means of reducing Mr Bussey's exposure to asbestos. Anglia could have required him to do the cutting and caulking outside, alternatively to wear a respirator.

57. As things stood in 1965 to 1968 Anglia could not know, one way or the other, whether the extent of Mr Bussey's exposure was liable to cause mesothelioma. It might or might not do so. There were ready means of reducing that risk. In my view, if the judge had not felt constrained by the decision in *Williams*, he might have concluded that, as a reasonably prudent employer, Anglia ought to have foreseen that

risk; since that risk could be avoided by simple precautions, it was not a risk which ought to be accepted.

58. Hale LJ observed in *Jeromson* at [37] that if the exposure is variable and the employer cannot know the extent of the exposure, the employer ought to consider the risks involved in "the potential maximum exposure". She added "only if he could be reassured that none of these employees would be sufficiently exposed to be at risk could he safely ignore it". It might be said Anglia could not be so reassured in the present case.

59. Let me now return to the judgment under appeal. It is clear from paragraphs 40 to 45 that the judge treated the levels specified in TDN13 as determinative of the present case. He considered that the Court of Appeal's decision in *Williams* compelled that result. Whilst I understand why the judge in this case (and judges in some other first instance decisions) took that view, I do not regard it as correct. TDN13 sets out the exposure levels which, after May 1970, would trigger a prosecution by the Factory Inspectorate. That is a relevant consideration. It is not determinative of every case.

60. If the judge had not felt so constrained he would have looked at the issues of foreseeability and breach more broadly. Anglia called no factual evidence about what it knew or considered in the late 1960s. Instead Mr Feeny places reliance on certain answers which he elicited from Mr Brady in cross-examination. He has set these passages out in section 5 of his skeleton argument and taken us through them in his oral submissions. Unlike the judge we have not heard the oral evidence of the experts. Nor do we have a full transcript of the evidence called. I have come to the conclusion, with considerable regret, that the Court of Appeal is not in a position to decide the liability issue on the basis of the material before us.

61. In the result I would allow this appeal and set aside the judgment in favour of Anglia on liability. I would remit this case to the trial judge for him to re-determine the issue of liability, bearing in mind the guidance in paragraph 59 above. The judge could either hold a full re-trial or, alternatively, he could read the transcript of the previous trial and hear further submissions from counsel in the light of this judgment.

Lord Justice Underhill:

62. I agree that this appeal should be allowed and, reluctantly, that it must be remitted to the Judge for further consideration. My reasons at most points correspond to those given by Jackson LJ. In particular, I think that the Judge was wrong to treat this Court in *Williams* as having laid down a binding proposition that employers were entitled to regard exposure at levels below those identified in TDN 13 as "safe", even in the period 1970-1976, still less at a period prior to its publication. There is the further point that in the present case, and I suspect in many others, there is no reason to suppose that the employer took any steps to measure the level of exposure which Mr Bussey or others doing similar work encountered and could not have accordingly known whether it was above or below any supposed "maximum safe limit". Attempting to answer the issue in this case by comparing back-calculations (it might be fairer to say "back-guestimations") of Mr Bussey's exposure against subsequently published figures of the kind appearing in TDN 13 is in my view unsound.

63. However, at one point I would respectfully differ from Jackson LJ's analysis. At paras. 41-44 of his judgment he addresses the use by Aikens LJ in *Williams* of the phrase "an *unacceptable* risk of asbestos-related injury" and holds it to be unobjectionable, on the basis that it means that level of risk which remains after taking all proper precautions: see para. 43. He accordingly adopts it in his own formulation of the correct test of foreseeability at para. 44. I do not think that its use in that sense is helpful in this context, and indeed I believe that it is liable to mislead. I think it is important to split out the question of the foreseeability of the risk from the question of what precautions it was reasonable to take against it. In my view the right approach in principle to the necessary inquiry is twofold:

a) The first question is whether Anglia should at any time during Mr Bussey's employment – that is, between 1965 and 1968 (the precise dates are not known) – have been aware that the exposure to asbestos dust which his work involved gave rise to a significant risk of asbestos-related injury. (I say "significant" only so as to exclude risks which are purely fanciful: any real risk, albeit statistically small, of a fatal illness is significant.) That will depend on how quickly the knowledge, first widely published in 1965, of the fact that much lower exposures than had previously been thought to be dangerous could cause mesothelioma was disseminated among reasonable and prudent employers whose employees had to work with asbestos. One aspect of this question is whether, even though Anglia may have been aware of the risk in general terms, it was reasonable for it at the material time to believe that there was a level of exposure below which there was no significant risk, and that Mr Bussey's exposure was below that level.

b) If the answer to the first question is that Anglia should have been aware that Mr Bussey's exposure gave rise to such a risk (including that there was no known safe limit) the second question is whether it took proper precautions to reduce or eliminate that risk. On the facts of the present case, that question may not be difficult to answer, since, as Jackson LJ says at para. 56, the Judge found that there were two simple precautions that could have been taken, and there seems to be no suggestion that they were either impractical or unreasonably expensive: even if the risk was understood to be small, given its seriousness if it eventuated, the precautions ought to have been taken.

I do not in fact think that this differs from what Jackson LJ says at para. 49 of his judgment; my concern is only with the introduction in para. 44 of the concept of "unacceptable" risk. Although that term is indeed used in *Williams* I do not believe it forms part of Aikens LJ's ratio.

64. Although both counsel tried to persuade us that the answer to the first question was clear on the evidence before the Judge, albeit that he had not made the necessary findings, I feel compelled to agree with Jackson LJ that we are not in a position fairly to determine it for ourselves.

Lord Justice Moylan:

65. I agree that this appeal should be allowed for the reasons given by Jackson LJ save that I differ from his analysis to the extent and for the reasons set out in Underhill LJ's judgment. Like Underhill LJ, I have concerns about the categorisation of risks as being either acceptable or unacceptable. At a theoretical level nothing is free from all risks but I can see that to seek to address whether a particular risk is acceptable or unacceptable could well lead to confusion rather than assisting the court in determining the critical question of the foreseeability of the relevant risk. Further, in the context of mesothelioma, for which no safe level of exposure to asbestos dust has been identified, the description of the risk as being acceptable has particular problems.

66. I would add that I found Mr Rawlinson's argument, that TDN 13 did not purport to establish a safe limit for exposure to asbestos, convincing. As referred to by Jackson LJ [59] it was a document designed to provide guidance on when HM Factory Inspectorate would bring proceedings. Further, as also referred to by Jackson LJ [55], during the period when Mr Bussey was employed by Anglia, there was no accurate method for measuring the level of asbestos fibres in dust.

67. I also regret that, in the absence of the necessary findings, the evidence is not sufficient to enable this court to determine the issue of liability. This is particularly regrettable because the experts agree (as set out in [54] above) that Mr Bussey's employment with Anglia "would have post-dated knowledge of the risks of mesothelioma and that exposure to relatively small quantities of asbestos dust … was potentially harmful". This provides strong support for the conclusion that the relevant risk of injury would have been reasonably foreseeable to Anglia. However, it does not necessarily provide the answer to the issue of liability in particular because of the matters identified by Underhill LJ.