Mesothelioma: a new generation of claims

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Lord Brown in *Sienkiewicz*

- *"Although therefore, mesothelioma claims must now be considered from the defendant's standpoint a lost cause, there is to my mind a lesson to be learned from losing it: the law tampers with the "but for" test of causation at its peril."* At paragraph 186.

Mesothelioma Claims from 2011 onwards

No. of claims since 2011	Cases where the Claimant was successful	Cases where the Defendant was successful	Cases heard at an appellant level
10	2	8	5

Why the change of climate?

- *"Especially having regard to the harrowing nature of the illness, judges, both at first instance and on appeal, must resist any temptation to give the claimant's case an additional boost by taking a lax approach to the proof of the essential elements."* Per Lord Rodger, *Sienkiewicz v Grief* at paragraph 166.

- *"In summary, safety must, in my view, be judged according to the general knowledge and standards of the times. The onus is on the employee to show that the workplace was unsafe in this basic sense."* Baker v Quantum Clothing Group Ltd [2011] UKSC 17, per Lord Mance at paragraph 80.

Asmussen v Filtona Untied Kingdom [2011] EWHC 1734 (QB)

- *"In the light of these conclusions I have concluded that the Defendant could not have foreseen the injury to the Claimant which occurred. While the Defendant failed to take specific steps which would have prevented or reduced the risk of disease, its failure must be judged by the imperfect standards of the time and not by hindsight. The Defendant is entitled to rely on the recognised and established practices of the time; and this is not a case in which the prevailing practices were obviously bad, nor where the Defendant had developed knowledge of its own. If the Defendant had sought authoritative advice as to the risk from asbestos lagging on the pipes in the factory, it is unlikely that it would have been advised to take any particular precautions to eliminate all lagging from the factory, or to change its practices for cleaning or carrying out such limited repairs as were carried out."* Per Simon J at paragraph 61.

Williams v University of Birmingham [2011] EWCA Civ 1242

- *"In my view the best guide to what, in 1974, was an acceptable and what was an unacceptable level of exposure to asbestos generally is that given in the Factory Inspectorate's "Technical Data Note 13" of March 1970, in particular the guidance given about crocidolite. The University was entitled to rely on recognised and established guidelines such as those in Note 13. It is telling that none of the medical or occupational hygiene experts concluded that, at the level of exposure to asbestos fibres actually found by the judge, the University ought reasonably to have foreseen that Mr Williams would be exposed to an unacceptable risk of asbestos related injury."* Per Aikens LJ at paragraph 61.

Limits on *Williams*

- Unusual facts. *Billingham v Barnsley* [2013] EWHC 520 (QB); c.f. *McGregor v Genco* [2014] EWHC 1376 (QB) and *McCarthy v Marks and Spencer and D H Allan* [2014] EWHC 3183 (QB).
- EH10 of 1976: *"Exposure to all forms of asbestos dust should be reduced to the minimum that is reasonably practical."*

McCarthy v Marks & Spencer

- Inspection in ceiling voids of Marks & Spencer in late 1970s and up to 1984. Disturbance of asbestos residues. No warning or respiratory equipment provided.
- Warning given and respiratory protective equipment stipulated in 1984.
- Exposures agreed to be significantly below the level at which respiratory protective equipment was recommended in EH10.

Judgment in *McCarthy*

- *"The interpretation of the phrase "as far as is reasonably practicable" is a key indicator to the issues in this case. It involved a balancing exercise according to current standards at the time, Baker v Quantum Clothing Group Ltd. & Others [2011 UKSC] 17, 65 82 per Lord Mance."* Per David Pittaway QC (sitting as a Deputy High Court Judge) at paragraph 87.

Other issues in *McCarthy*

- Occupiers' Liability Act 1957? Relevance of the Defendant's warehouseman on site?
- Relevance of the Deceased's status as Director of the third party? Cf. *Brunder v Motornet Service and Repairs* [2013] 1 WLR 2783
- Finding that Deceased was not a sole Director and that *Brunder* was not concerned with Civil Liability (Contribution) Act 1978?

Causation?

- Following *Sienkiewicz* and *Wilmore*, any exposure found to be in breach will be considered material.
- De minimis arguments ave not been followed so far- *Williams v University of Birmingham*.

Questions