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King's Bench Walk

The Court of Appeal unanimously allows the Claimant's appeal in Bussey v Anglia Heating Ltd

Michael Rawlinson QC and Gemma Scott were instructed by Caroline Pinfold and Peter Williams of Fieldfisher to act on behalf of the widow of David Bussey.

Mr Bussey developed mesothelioma as a result of his occupational exposure to asbestos. From 1965 to 1968, he was employed by the Defendant as a plumber. In the course of that employment, he handled and cut asbestos cement pipes and manipulated asbestos rope to caulk joints.

At first instance, HHJ Yelton (sitting as a Deputy High Court Judge) dismissed the claim, finding that:

1. Mr Bussey developed mesothelioma as a result of his occupational exposure to asbestos;
2. During his employment with the Defendant, his exposure fell below the levels set out in TDN13;
3. In the light of *Williams v University of Birmingham* [2011] EWCA Civ 1242, a claim could not succeed if the exposure was below the levels in TDN13.

The Claimant was granted permission to appeal on the law. The appeal was heard by Lord Justices Rupert Jackson, Underhill and Moylan on 23 January 2018.

The Court unanimously allowed the Appeal on the following grounds:

1. The judge was wrong to treat *Williams* as having laid down a binding proposition that employers were entitled to regard exposure at levels below those identified in TDN13 as "safe". That document 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 line to be applied to asbestos exposure before or after that period.
2. It was relevant that neither *Jeromson v Shell Tankers UK Ltd* [2001] EWCA Civ 100 nor *Maguire v Harland and Wolff PLC* [2005] EWCA Civ 1 was cited in If Aikens LJ had those two decisions in mind, he would not have suggested (if that was his intention) that TDN13 was a general yardstick for determining the issue of foreseeability.
3. The majority (Underhill and Moylan LJJ) held that Aikens LJ's use of the phrase *"an <u>unacceptable</u> risk of asbestos-related injury"* was liable to lead to confusion. Courts should not seek to address whether a particular risk is acceptable or unacceptable. Rather, judges should split out the question of the foreseeability of the risk from the question of what precautions it was reasonable to take against it.
4. When considering foreseeability, *"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".*
5. Thereafter, a Court must ask whether the defendant took proper precautions to reduce or eliminate that risk.
6. Their Lordships endorsed Hale LJ's observation in *Jeromson* that, if exposure is variable and an employer cannot know the extent of the exposure, he ought to consider the risks involved in *"the potential maximum exposure"*. Further that *"only if he could be reassured that none of these employees would be sufficiently exposed to be at risk could he safely ignore it".*

The case has been remitted to HHJ Yelton to re-determine liability in the light of these findings.

The full judgment can be found here.