TOO LOW TO KNOW?

Theo Huckle and Christopher Johnson explore asbestos exposure guidance limits and the foreseeability of injury

A defendant may only be liable in negligence if the kind of injury suffered by the claimant (though not necessarily its severity or extent: *Wagon Mound No.2* [1967] 1 A.C. 617) is a reasonably foreseeable consequence of the defendant's failure. This will also apply to breach of statutory duty where a negligence standard is imported, including for failure to take *reasonably* practicable steps: *Baker v Quantum* [2011] UKSC 17 .

If the alleged breach is exposure to asbestos, then a two-stage enquiry must be conducted:

- What was the claimant's exposure to asbestos in fact?
- Was asbestos-related injury a reasonably foreseeable consequence of that exposure?

Since 1960, various publications have contained asbestos exposure limits. A court addressing the second stage must consider what role these asbestos exposure limits should play. This article summarises recent case law in the area, and argues that the correct and binding approach is that taken by the Court of Appeal in *Maguire v Harland & Wolff* [2005] EWCA Civ 1; P.I.Q.R. P21.

The knowledge of and public concern about risks associated with asbestos exposure developed through the 1960s and 1970s. The regulatory framework applicable through this period has been provided by the general anti-dust provisions of the Factories Acts, superseded in turn by the Asbestos Regulations 1969, the Control of Asbestos at Work Regulations 1987, and latterly by the Control of Asbestos Regulations 2005. 'At Work' has become an irrelevance to some extent, because of the risks now known to be presented by asbestos to anyone encountering it.

Different considerations applied from the Control of Asbestos at Work Regulations 1987, when a heavy emphasis moved to prior identification and assessment by employers of contact with, and risks from, asbestos, and so this article is principally concerned with liability issues arising for exposures in the period prior to 1988. Moreover, the developing guidance became much stricter in 1983-4 so we can effectively concentrate on knowledge of risks in the period to 1983.

Maguire v Harland and Wolff

The claimant contracted mesothelioma as a result of 'secondary' exposure to asbestos dust brought into her home at the end of each working day on the work clothes of her husband, during 1961 to 1965.

In 1960, the Ministry of Labour had published a booklet entitled *Toxic Substances in Factory Atmospheres* ('The 1960 Booklet'). This is considered by Judge LJ:

> 32 '... The booklet refers to "Permissible Concentrations" and includes a schedule of figures of "maximum permissible concentrations", and suggests that further action to achieve "satisfactory working conditions" would be necessary if and when the specified levels of concentration were exceeded. Under the heading "Mineral Dusts", the figure relating to asbestos reads "177" and appears beneath the letters PPCC, particles per cubic centimetre of air. This method of calculation derives from the US.
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> 'In the UK the equivalent figure would be expressed in fibres per millimetre... The end result is that this "hygiene standard" for asbestos should be regarded as equivalent to an asbestos fibre concentration somewhere in the broad range of 5/30 fibres/ml... the "177" figure relates to average concentrations for a normal [8 hour] working day...'

The evidence was that the claimant's average exposure would have been much lower than 5/30 fibres/ml, but would frequently have exceeded 5/30 fibres/ml for short periods.

Mance LJ considered reasonable foreseeability:

> 77. 'I consider first whether it can be suggested that the appellants were not in breach of duty towards Mrs Maguire, since they did not expose her to any (average) exposure which would not have been permissible in relation to their employees... it seems to me that any such suggestion would miss the point of s.47 and of the Factories Inspectorate's booklets and reports.
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> 'Because of the general and uncertain risks of asbestos dust (in particular), the primary pre-occupation of any employer should have been to reduce exposure to any such dust "as far as practicable".
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> 'Neither the 1960 booklet nor the 1959 Report 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 passage headed Concentration of the dust in the 1959 Report also explains the List on the basis that "it was necessary to have some guide to which the efficiency of control measures can be related".
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> '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...'

Longmore LJ added:

> 90. '...In other words it is only when it is impracticable to reduce exposure to dust, that permissible concentrations can have any relevance in relation to employees.'

The message of the 1960 Booklet was that exposure to asbestos must be reduced as far as practicable: defendants could not properly assert that injury from exposure below that level was not foreseeable so that the exposure was 'safe'.

However, the claimant's claim was dismissed on the basis that it was not foreseeable at that time (to the mid 1960s) that the defendant's breach would injure anyone but Mr Maguire, and so no duty was owed to Mrs Maguire.

Williams v Birmingham University

However, a much stricter approach to what a claimant had to prove was taken by a differently constituted court five years later. The claimant in *Williams v Birmingham University* [2011] EWCA Civ 1242; [2012] PIQR P4 was the widow of Michael Williams, who had died from malignant mesothelioma caused by exposure to asbestos while carrying out science experiments in a service tunnel in the basement of the defendant's building in 1974.

The judge had found that Mr Williams' exposure to asbestos fibres (including 'blue' crocidolite) was close to or just above 0.1 fibres/ml, but less than 0.2 fibres/ml (see [43]).

Giving the court's judgment, Aikens LJ considered whether asbestos-related injury was a reasonably foreseeable consequence of that exposure.

Aikens LJ placed particular weight on the asbestos exposure limits in Technical Data Note 13 published by the Factory Inspectorate in 1970 ('TDN13'). TDN13 contained guidance on how the Asbestos Regulations 1969 would be enforced. In respect of crocodilite, TDN13 stated:

> *The Regulations will apply in full whenever workers are engaged in processes involving crocidolite because the concentration of this mineral, that is believed to be liable to be dangerous to health, is very small indeed.*
>
> *An approved form of respirator will be required to be worn unless the concentration in the breathing zone of a worker in a crocidolite process can be maintained below 0.2 [fibres/ml] when measured as the average concentration over a 10 minute sampling period.*

Aikens LJ addressed foreseeability at [61]:

> *'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 [TDN13], in particular the guidance given about crocidolite.*
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> *'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.'*

The court held that the claim failed on foreseeability.

Contrasting the approaches

The question of fact in *Maguire* and *Williams* was the same - whether or not asbestos-related injury was a reasonably foreseeable consequence of a given exposure to asbestos.

However, the legal approach taken by the Court in *Williams* was markedly different from that in *Maguire*. *Maguire* emphasises precaution – a reasonable employer would reduce asbestos exposure as far as practicable, and would *not* consider the published asbestos exposure limits to constitute a safe level of exposure; *Williams*, on the other hand, holds that a reasonable employer would regard the published asbestos exposure limits to be the best guide as to what was an acceptable level of exposure.

The difference in approach may be explained in part because *Maguire* was not cited to the Court of Appeal in *Williams*. Therefore, *Williams* is arguably *per incuriam* and not binding (albeit the Court of Appeal's comments on the 1960 Booklet in *Maguire* did not form the *ratio* of that decision).

It is suggested that, had the precautionary approach been taken in *Williams*, the result would have been different. In particular:

1. TDN13 expressly states that the 'concentration of [crocidolite] that is believed to be liable to be dangerous to health, is very small indeed.' This is crucial and not appropriately emphasised in *Williams*. Just as with the 1960 Booklet analysed in *Maguire*, TDN13 expressly declines to define a 'safe' level of exposure and emphasises the general danger.

2. In fact, the 0.2 fibres/ml threshold was not even adopted as a general threshold for enforcement of the Regulations. Rather, it was the threshold for when *respirators* were required or the occupier would be prosecuted. This is crucial and provides the simple answer. The 1969 Regulations, which did not apply in *Williams*, applied to factories and like premises. They provided for a hierarchy of measures to be taken to guard against inhalation of asbestos dust.

   At the bottom of the hierarchy was a general duty (Reg 9) to keep the environment clean of asbestos dust where practicable whenever any process was undertaken in which asbestos dust could be given off, using where *practicable* a dustless method (ie. special vacuum cleaners – Reg 10) and, if not practicable, cleaners were to use respiratory equipment (Reg 11). From there up, any loose asbestos was required to be in closed containers (Reg 15), there was to be exhaust ventilation to *prevent* asbestos dust entering the air of any workplace (Reg 7), and, where that was *impracticable*, protective equipment – respirators and protective clothing – were to be used (Reg 8).

3. Thus TDN13 provided an absolute maximum level of exposure which required the use of the highest form of protection, not a level below which no measures were required at all.

   The reasoning of the Court of Appeal appears to conflate these concepts. In disease/exposure cases, the question of reasonable steps will rarely be 'all or nothing', as appears to underlie the *Williams* view. Instead, there will usually be options for protection, depending on how serious the risk is perceived to be.

   Put simply, the first and most basic step to protect is to warn and advise workers of the risks of exposure and how to avoid or minimise it, and there are many others, including the hierarchy of measures in the 1969 regulations.

4. The court in *Williams* was wrong to rely on expert evidence in relation to what an employer would have regarded as reasonably foreseeable, or rather 'acceptable'.

   We submit that while the court may be constrained in part by the evidence before it, what is reasonable and 'acceptable' in this context is a matter of law for the court.

   What the experts should be describing is the state of knowledge. The fact that occupiers/employers - and their advisors - may characterise knowing exposure to a risk of terrible injury as 'acceptable', does not make it so in law, so as to deny the injured citizen a remedy.

   The legal test is what steps are reasonably required of the duty holder in the face of uncertain risk, which is precisely the question to which the *Maguire* decision is directed. Thus, what a reasonable and prudent employer would have made of the established level of knowledge is a question for the court (see *Shell Tankers UK Limited v Jeromson* [2001] EWCA Civ 101 at [43] . *Jeromson* was not cited in *Williams*, though it is right to note that *Asmussen* [2011] EWHC 1734 (QB), which referred to it, was cited; though its implications do not appear to have been considered.

   However, the fact that the court did rely on particular evidence in the case may provide a basis to revisit the issue with the right engineering support, even at first instance.

5. It seems to us peculiar that TDN13 has been relied on since *Williams* as reflecting some form of official determination or advice from the HSE that exposure up to the 2 f/ml level in the case of crocidolite was - up to the 1980s - 'safe' or 'acceptable' for the purpose of qualifying a duty to take all reasonable steps to avert a known but unquantifiable risk. This begs the question 'acceptable to whom?'.

The situation is very different from, say *Baker v Quantum*. TDN13 was not a publication aimed at employers as guidance as to risks, and we are not aware of any evidence called to suggest that employers generally did or ought to have known about it at all when 'keeping abreast'.

Its context was a regulatory framework that clearly required reduction of exposure as far as practicable in circumstances where, to say the least, there was great uncertainty about the levels of risk presented by particular quantities of crocidolite, as discussed in *Maguire* with a different view of principle expressed than in *Williams*.

The levels of risk were uncertain, though sadly the catastrophic effects of the realisation of the risk, ie. mesothelioma, were already all too clear. In contrast, in *Baker*, the guidance relied on to set the expected or deemed knowledge standard for liability ('Noise and The Worker' from 1963, and the 1971 Code of Practice) was specifically directed at employers advising at what noise levels protection should be introduced, and there was, accordingly, a logical basis for suggesting that this defined the general standard of knowledge of the risk of injury.

The subsequent cases

In *Hill v Barnsley* [2013] EWHC 520 (QB), the defendant argued foreseeability, relying on *Williams*. The claimant argued that *Williams* was inconsistent with *Maguire*, yet it is striking that both counsel agreed that TDN13 provided the limit of foreseeability of hazard, which it expressly does not. There is a hint in Bean J's judgment that the judge was uncomfortable with *Williams*, but he was able to avoid the *Maguire/Williams* issue entirely on the facts of the case, finding exposure above the TDN13 levels, and the claim succeeded.

In *McGregor v Genco (FC)* [2014] EWHC 1376 (QB), the claimant sales assistant's exposure to asbestos arose from removal of old escalators over a six-week period in 1976, around 10 feet from her shoe department.

The claim failed because Paterson J held that a reasonable employer would simply not have been aware of a risk of exposure to asbestos at all, rather than (as in *Williams*) because the employer should have been aware of a risk of exposure, but that exposure was at too low a level for asbestos-related injury to be foreseeable.

However, the court appeared to proceed on the assumption that the TDN13 levels were 'the safe standard'. There were no dust measurements. In their absence, the experts agreed that it is possible that the claimant was exposed to in excess of the TDN13 standards... but unlikely. The claim failed.

In *McCarthy v Marks & Spencer* [2014] EWHC 3183 (QB), the claimant worked for a shopfitting company. He was subcontracted to M&S for three weeks in the summer of 1967 (thus prior to the 1969 Regulations), and carried out store inspections during 1967-1990 (albeit with suitable protection from 1984).

The claimant was diagnosed with mesothelioma in 2006 and died in 2009. The judge found this was caused by exposure to asbestos at Marks & Spencer. The joint engineering report concluded that the exposure was *'unlikely to have exceeded the occupational exposure limits applicable at the time'*.

As to foreseeability, the judge found as follows:

> 86 '...There was a developing awareness of the dangers of working with asbestos throughout the last century, which became clearer during the 1960s... There was clearly a widely held view... that there were levels of asbestos dust described in hygiene or later control standards below which additional precautions were not required, eg. [TDN13]...
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> 88. '... the specialist contractors, Darlington, were aware of the guidance... their operatives were wearing protective respiratory equipment... It seems to me that a distinction should be drawn between the specialist independent contractors who were carrying out the installation... and the defendant, as to... the risks... with asbestos.
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> 90. 'I do not consider that, by the standards of the time, it was reasonably foreseeable that the presence of asbestos dust was likely to be injurious to the health of other contractors on site, who came into contact with asbestos dust, certainly not in the quantities which the experts are agreed were involved.'

In 1976, the HSE issued Guidance Note EH10. This recommended that 'Exposure to all forms of asbestos dust should be reduced to the minimum reasonably practicable', and 'in any case' should 'never' exceed the limits contained in the document, essentially the TDN13 levels. The judge did not consider that the publication of EH10 altered his analysis, stating:

> 94. 'I have concluded that the phrase "so far as is reasonably practicable" contained in [EH10] did not extend the standards of the time to requiring protective respiratory equipment and clothing to be used whilst the deceased was carrying out inspections...
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> 99. 'I am not satisfied that in 1967, as a non-specialist contractor, the third party should have been familiar with the [1967] guidance issued by the Asbestos Research Council; however, by 1983 I consider that the guidance in place was sufficient that it should have percolated through to the third party, as contractors, and steps should have been taken...'

Maguire was not cited, and the apparent extension of *Williams* beyond 1976 (when EH10 was published) seems expressly at odds with *Maguire* where significant weight is placed on the underlying responsibility on employers to reduce exposure so far as practicable. The context is the continuing development of knowledge of risks and public concern that no exposures to asbestos should be regarded as 'safe' or 'acceptable', as emphasised in *Maguire*.

The duty of an employer is well established to be to keep abreast of developing knowledge and act accordingly to protect against known risks: *Stokes v GKN* [1968] 1 WLR 1776, 1783. In any event, the post-1976 extension is confined on the facts to non-specialist contractors.

Woodward v SSEC [2015] EWHC 3604 (QB) concerned a claim by a canteen worker at a colliery. The claimant relied on exposure in 1976-7, both directly from industrial oven gloves, and indirectly from the overalls of workers going into the canteen for food.

HHJ Platts considered the level of asbestos to which the claimant was likely to have been exposed, and concluded that this did not exceed the levels in TDN13. The judge then went on to consider whether or not asbestos-related injury was reasonably foreseeable following such exposure.

The claimant sought to distinguish *Williams* on the basis that in *Woodward*, the defendant had specific Asbestos Research Council guidance from which it should have known that contaminated clothing should not be taken into clean areas. The judge found as follows:

> 69. '...that guidance was that contaminated clothing should not be taken into clean areas, as they were called, or into canteens. In the circumstances, it is submitted that there is, or should be, no exposure limit, that TDN13 is irrelevant and that, because of the accepted risk of mesothelioma which was recognised and because of the guidance current at the time which, if adopted, would have avoided that risk, the claimant should succeed.
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> 70. 'I am afraid that, attractively though that argument was put

> and as logical as it might seem to some, in my judgment the law, as it currently stands, does not allow for such an approach. It seems to me that a distinction has to be drawn between a risk of injury and foreseeability of injury... the risk of mesothelioma was well known in the 1970s. It was, or should have been, known to the University of Birmingham in *Williams*; it was, or should have been known to the National Coal Board in this case. However, the question is not whether there was that risk, but whether the harm was foreseeable...
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> 71.'... to identify a risk of injury is not enough; it must be a sufficient risk, in my judgment, that a reasonable employer would take precautions against it, and it is against that background that Aikens LJ concluded that TDN13 was the best guide to what was considered acceptable and not acceptable as levels of exposure in 1974.
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> 74. 'What, then, of the guidance concerning clothing published by the Asbestos Research Council upon which the claimant relies? It seems to me the answer is that it is guidance and just that. It sets out good practice and, as Mrs Boyle conceded during her evidence, a failure to follow it would amount to poor practice. However, that is not the test for legal liability.'

This judgment draws a novel distinction between risk of injury and foreseeability of injury. We confess not to understand this as it was described here. If a person foresees or reasonably should foresee a risk of injury to his worker/visitor/neighbour, then surely it is his duty to consider what if any steps he should take to avert/minimise such risk, subject always to the test of reasonableness (and possibly the considerations in *Caparo v Dickman* [1990] 2 A.C. 605) of what is 'just and reasonable' to require) and balancing the gravity of risk against the cost/inconvenience of protective steps.

Moreover, *Williams* is interpreted as creating a black and white distinction between:

- exposure under TDN13 (where the risk of asbestos-related injury is 'acceptable' and hence the injury '*not* foreseeable', which seems rather a non-sequitur to us) and
- exposure over TDN13 (where it is).

Finally, TDN13's status as a 'trump card' is enhanced: specific guidance on exposure from contaminated clothing is ignored, even though that guidance was directed to this very situation, whereas TDN13 was not.

In setting out the law in *Smith v Portswood House* [2016] EWHC 939 (QB), the judge referred to *Williams* and its subsequent treatment in *McGregor, McCarthy* and *Woodward*. *Maguire* and *Jeromson* were not cited, and it was 'common ground' that breach required exposure beyond the limits of TDN13 (see [143]). The point was therefore not argued and this case takes the issue no further.

In *Prater-v-BMH* (Unreported, 9 June 2016), it was again assumed without argument that *Williams* was correct, but Recorder Gardner QC went on to consider the period during which TDN13 would be a guide to what was an 'acceptable' level of asbestos exposure:

> 19. 'TDN13 was published in March 1970... I do not accept that it would be illogical to require a higher standard than TDN13 before it was published. If an employer does not know whether there is any safe level of exposure to asbestos dust, it makes perfect sense to say that the exposure must be reduced to the maximum extent practicable, as the publications... indicate. If, subsequently, safe levels can be established, they can be taken into account...'

The Recorder implicitly reasserted the starting point of the common law. The defendant will be judged by reference to what they knew or ought reasonably to have known, and by what steps they ought reasonably to have taken in light of that level of knowledge. Uncertainty does not mean no action is required, and it may even mean more is required compared with a later state of knowledge. We say that uncertainty was the situation throughout the period that TDN13/EH10(1976) were current; they did not even purport to establish a 'safe' level or standard.

Challenging the *Williams* orthodoxy

We argue that there is a strong case that the *Williams* approach to TDN13 is neither binding nor correct.

This argument was raised in *Hill*, but not decided. Subsequently, it appears that the *Williams/Maguire* compatibility argument has usually just not been raised.

However, in *Bussey v Anglia Heating* (Unreported, 12 May 2017) the point was argued, but HHJ Yelton held that he was bound by the Court of Appeal's decision in *Williams*, and the widow's claim failed, as she could not prove that the levels of his exposure had exceeded TDN13. If the claimant sought to argue that *Williams* was wrongly decided, she had to put that argument to the Court of Appeal or the Supreme Court: *Willers v Joyce* [2016] UKSC 44; [2016] 3 W.L.R. 53 applied. It is understood that the claimant will seek to appeal.

As a result, the law deriving from *Williams* seems presently to be, for cases to High Court level:

- For the period 1970 to 1976, (assuming no finding of greater actual knowledge of the defendant) asbestos-related injury is foreseeable if and only if exposure exceeds TDN13.
- The above principle extends to the period between 1976 and 1983 where the defendant is a non-specialist contractor.
- From 1983, it becomes increasingly difficult for a defendant to succeed on the basis that more than *de minimis* exposure nevertheless did not give rise to foreseeable risk of injury. If *Maguire* is right, however, this applies throughout.

Practitioners should be aware of the dispute as to the correctness and binding nature of *Williams*, with a view to challenging that decision as conflicting with *Maguire* and *Jeromson*; decisions which themselves bound the later Court of Appeal. In our view, *Williams* and its progeny remain eminently challengeable, certainly in the Court of Appeal or Supreme Court.

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