



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 23

PD2803/15

OPINION OF LORD UIST

in the cause

NICOLA STEVEN WATT OR MURRAY AND OTHERS

Pursuers

against

LEND LEASE CONSTRUCTION (EUROPE) LIMITED

Defenders

**Pursuers: Stuart QC, Shields (sol adv); Thompsons
Defenders: McGregor, BLM**

3 March 2022

Introduction

[1] The late James Watt (Mr Watt) was born on 18 January 1941 and died of mesothelioma on 14 January 2017. He was employed by the defenders, then known as Bovis Construction Limited (“Bovis”), as a joiner between January and June 1963. This action is brought by his surviving relatives against the defenders on the ground that his mesothelioma was caused by his negligent exposure to asbestos by the defenders during his period of employment with them and by their breach of Regulation 20 of the Construction (General Provisions) Regulations 1961 (“the 1961 Regulations”).

[2] Regulation 20 of the 1961 Regulations provided that where in connection with any grinding, cleaning, spraying or manipulation of any material there is given off any dust or fume of such a character and to such an extent as to be likely to be injurious to the health of persons employed all reasonably practical measures shall be taken either by securing adequate ventilation or by the provision or use of suitable respirators or otherwise to prevent the inhalation of such dust or fume. Regulation 20 of the 1961 Regulations, which came into force on 1 March 1962, replaced Regulation 82 of the Building (Safety, Health and Welfare) Regulations 1948 and was in the same terms as Regulation 82 of the 1948 Regulations. It was therefore the 1961 Regulations which were in force during the period of Mr Watt's employment with Bovis.

The pleadings

[3] It is averred by the pursuers that during his employment with the defenders Mr Watt worked on the construction of shop premises including a basement car park in Argyle Street, Glasgow and was exposed to significant amounts of asbestos dust cutting and fitting asbestos sheets to line an area about 25 by 20 feet of the car park ceiling. He cut 8 by 4 feet asbestos sheets into 2 by 2 feet tiles with a saw, planed the edges of the cut sheets and formed a bevel on each side. He then fixed the cut sheets into position with an electric drill and fixed them with screws. He worked above his head and the asbestos dust rained down on him. Substantial quantities of asbestos dust were given off in the air in the course of these operations. Asbestos dust and debris were given out into the atmosphere and would cover surfaces, including the floor, where it was further disturbed by persons walking over it and when being swept up. Asbestos dust also settled on his person and clothes and was further disturbed when he removed his clothes. Throughout the period of his employment

with them the defenders knew or ought to have known of the risk of respiratory injury to employees exposed to asbestos dust. From before and throughout his employment with them they should have appreciated the risk of respiratory injury to him from asbestos dust and taken steps necessary to guard against it.

[4] In response the defenders aver that any exposure to asbestos during Mr Watt's employment with Bovis would have been secondary, intermittent and of a low level for 3 or 4 days. Any work exposing him to asbestos is likely to have taken place outdoors. Any exposure would have been no higher than 0.3 fibre/ml to 8 fibre/ml. Any exposure would have been significantly below the Helsinki criteria and the published research work of Parkes. At the time any such asbestos exposure took place in 1963 it would not have been reasonably foreseeable to Bovis that Mr Watt would be exposed to the risk of developing an asbestos-related condition. Had such level of exposure occurred in 1971 the Factory Inspectorate would have taken no enforcement action.

The evidence

[5] I heard evidence from four witnesses in the course of the proof. On behalf of the pursuers there was led the evidence of Joe McCluskey, a representative of the firm of solicitors acting for the pursuers, who took a statement from Mr Watt on 17 June 2015 which the latter signed on 25 June 2015, Robin Howie, an occupational hygienist, and Dr Peter Semple, a retired consultant in general and respiratory medicine. On behalf of the defenders there was led the evidence of Professor Roger Willey, an occupational safety and health consultant with special expertise in asbestos. In addition, certain evidence was agreed in three joint minutes. The awards of damages which should be made to each pursuer in the event of liability being established were agreed. The issue to be determined

on the basis of the evidence led at the proof is whether the defenders were, or ought to have been, aware when Mr Watt was employed by them that the asbestos exposure at the levels to which he was subjected gave rise to a risk of injury.

[6] The relevant part of the statement of Mr Watt reads as follows:

“From approximately January 1963 until June 1963 I worked with Bovis Construction.

I was employed as a joiner and the site I was working at was the construction of new shops on Argyll (*sic*) Street in Glasgow. I recall it was a row of 3 shops that were being created and behind the shops there was a further building being built behind the shops (*sic*).

I had one job during this employment where I came into contact with asbestos.

There was a lane at the side of the shops where a small car park was being built and myself along with another joiner were (*sic*) responsible for fitting asbestos ceiling tiles in the car park.

I recall the area was around 25ft x 20ft and asbestos sheets had been delivered to sites for us to do the ceiling.

The asbestos sheets were flat white sheets that were around 8ft x 2ft. we had to cut the asbestos sheets into 4 x 2ft square panels and these were used as the ceiling tiles.

I estimated there was (*sic*)15 to 20 asbestos sheets required for the full job. The asbestos sheets were around 5/8" thick.

As I have mentioned one asbestos sheet could provide 4 different ceiling tiles. Each asbestos sheet required 3 cuts and it was handsaws we used to cut the sheets.

In cutting through the sheets, this caused a lot of dust to come off them and because we were working outside in an area, the dust was blowing about the place.

After we had the 2 x 2ft panels we then had to place the edge of the tiles and this would be the four edges on each tile and I had a hand-held plane that I used to plane the edges and to put a small bevel into each tile on each side. When doing this, this again caused further dust to be created.

Once the ceiling tiles had been prepared and were ready to fit we had a scaffold on site that we went up and the ceiling tiles were fixed to a timber frame.

When fixing the ceiling tiles to the timber frame, this involved having to drill holes in them for the screws to fit and when doing this I was working above my head and it

was an electric drill I was using when drilling through the sheets, this (*sic*) caused a lot of dust to be blown about from the power of the drill and the dust would fall down on my face.

I did this work constantly for 3 to 4 days and was working with the asbestos sheets and tiles throughout this period.

This was the only job I had at this site where I was exposed to asbestos. The rest of the time it was timber I was working with doing construction work and also roughing and finishing work.

I am unsure who owned the shops or what the shops became.

I wasn't provided with a mask or given any warnings about asbestos during this time.

I do not recall the name of the man who was working with me when I was doing the asbestos ceiling."

[7] Dr Semple took an early interest in work-related respiratory diseases from 1974.

He spoke to his reports dated 7 February 2016 (6/8 of process), 26 February 2016 (6/12 of process) and 26 July 2020 (6/83 of process). He had reviewed the available medical records relating to Mr Watt. In his last report he stated that in his opinion Mr Watt died of mesothelioma and that, on the balance of probabilities, his death was caused by his occupational exposure to asbestos. He considered it very significant that pleural plaques were found in the context of this case as they can be caused by low levels of exposure. Heavy exposure for a short period of time was significant.

[8] Mr Howie spoke to his report dated 15 March 2021 (6/75 of process) and adopted it as his evidence. His *curriculum vitae* is set out on pages 29 and 30 of that report. He has worked with asbestos since the early 1970s and described himself as "immersed in asbestos". He explained that there are six different types of asbestos, of which the three most important commercially in the UK were crocidolite (blue asbestos), amosite (brown asbestos) and chrysotile (white asbestos). Crocidolite and amosite are amphibole minerals,

whereas chrysotile is a serpentine mineral. The total number of fibres inhaled by a person in a given exposure situation is generally described as cumulative exposure, being the product of the average airborne fibre concentration and the duration of the exposure. A person exposed to an average airborne concentration of 1 fibres/ml for 10 years would have a cumulative exposure of 1 fibres/ml x 10 years = 10 fibres/ml.years. The same cumulative exposure would be given by an exposure of 2.5 fibres/ml for 4 years or an exposure to 10 fibres/ml for 1 year. The mesothelioma risk with crocidolite is about 5 times greater than with amosite and about 500 times greater than with chrysotile. It was therefore necessary to assess the type(s) of asbestos to which Mr Watt was likely to have been exposed and the likely severity and duration of exposure to each type of asbestos.

[9] He gave detailed evidence of the level of exposure to asbestos to which Mr Watt was, in his opinion, subjected in carrying out the tasks described in his above statement in terms of fibres per ml. Professor Willey also later gave similar evidence. I do not consider it necessary to go into this evidence in detail as the defenders would not at the material time have been aware of the level of exposure in terms of f/ml. On any view the level of exposure to asbestos to which Mr Watt was subjected as described by him in his statement was low level exposure over a very short period. Mr Howie summarised 15 opinions in his report, of which the following ten are relevant:

“1. It is considered that by the mid-1950s a reasonable employer would have been fully aware from the Annual Reports of the Chief Inspectors of Factories of the asbestosis, asbestosis with tuberculosis and asbestosis with lung cancer risks resulting from uncontrolled exposures to asbestos.

2. It is considered that throughout the period up to 1963 a reasonable employer would have ensured his full compliance with sections 47 and 4 of the Factories Act 1937 and sections 63, 29 and 4 of the Factories Act 1961: as date relevant.

3. It is considered that throughout the period up to 1963 a reasonable employer would have ensured his complete compliance with all duties specified by the

Asbestos Industry 1931, (*sic*) the Building (Safety, Health and Welfare) Regulations 1948 and the Construction (General Provisions) Regulations 1961.

4. I consider that throughout the period 1960-1963 a reasonable employer would have ensured its full compliance with the totality of the contemporary occupational exposure limits; (*sic*) including the requirements that exposure to all forms of airborne contaminants should be reduced to the minimum that was practicable.

5. It is considered that from 1960 onwards guidance for work with asbestos was published by HM Factory Inspectorate and that a reasonable employer would have ensured his knowledge of, and full implementation of, all relevant contemporary such guidance, backed up airborne dust monitoring: (*sic*) particularly so if visible dust was being generated.

...

10. It is considered likely that while employed with Bovis Construction Limited Mr Watt would have worked with asbestos insulation board containing about 15-25% of amosite or a mixture of amosite and chrysotile.

11. It is considered likely that while employed with Bovis Construction Limited Mr Watt was not warned of the dangers of work with asbestos and was not provided with a respirator.

12. It is considered likely that while employed with Bovis Construction Limited Mr Watt would have been exposed to a mean of about 25-35 fibres/ml of amosite when working with asbestos insulation boards.

13. It is considered likely that while employed with Bovis Construction Limited Mr Watt would have been exposed to a cumulative exposure of about 0.3-0.6 fibres/ml.years (*sic*) of amosite.

...

15. It is considered that throughout the period 1957-1963 a reasonable employer would have fully complied with all relevant legislation, regulations and guidance, would have warned their employees of the dangers from asbestos, would have provided suitable control measures / working methods to minimise emissions of airborne asbestos fibres; would have provided suitable Approved (*sic*) respirators and protective clothing; and would have applied the guidance given in the technical literature and in the relevant British Standard Specification for Respirators."

[10] In cross-examination Mr Howie accepted that in 1963 asbestos was used widely in domestic and everyday settings and its use in the construction trade was widespread

because it was cheap and useful. In 1963 there was an asbestos plant at Germiston in Springburn, Glasgow which produced asbestos. The exposure in Mr Watt's case was not heavy, but neither was it intermittent (by which he meant a day here and a day there). The short period was reflected in the calculation of cumulative exposure. A big employer such as Bovis should have been aware of the risk of injury in 1963. The link between exposure to small amounts of asbestos dust and the development of mesothelioma was evident from the paper by Wagner in 1960 published in the British Journal of Industrial Medicine, the premier medical publication in the industrial health area for both medical professionals and anyone in the health and safety field.

[11] Professor Willey emphasised in his evidence that Mr Watt was employed as a joiner. The Asbestos Industry Regulations 1931 were in force until May 1970, when they were replaced by the Asbestos Regulations 1969, and applied to quite specific tasks in the asbestos manufacturing industry, eg mixing, milling etc Mr Watt was not engaged in any of these tasks. By the standards of the time he was not employed as an asbestos worker. His exposure to asbestos would have been secondary, that is, not as the result of his principal employment as a joiner. He was exposed to asbestos for 3 or 4 days in an employment period of 6 months with Bovis. The asbestos work was not on a daily basis and in his opinion might be regarded as intermittent. He estimated Mr Watt's maximum exposure as being between 0.3 fibre/ml and 8 fibre/ml, depending on the job function and the asbestos material. He considered that to be low level exposure. He was of the opinion that at the time of the alleged exposure secondary and intermittent exposure to airborne asbestos fibres was not considered by the best academic researchers to be injurious to health. He set out a detailed review of medical research and medical knowledge in appendix 3 to his report. The claimed exposure to asbestos at Bovis occurred over 3 or 4 days in 1963, when asbestos

related disease was associated to long exposure to high dust concentrations. By the standards of the time Mr Watt's exposure was secondary, intermittent and low level. It was the opinion of Professor Willey that it would be unreasonable in 1963 to expect a company not directly engaged in asbestos related manufacturing works to have knowledge of the effects of secondary, intermittent and low level exposure to asbestos when the world's best medical research experts of that period did not have the knowledge until 1965-67 and when guidance to the asbestos user industry was not given until 1970-71. Even in 1971 the Inspectorate of Factories was giving advice that enforcement action would not be taken at airborne fibre levels which would today be regarded as quite unacceptable. It was the opinion of Professor Willey that it would be unreasonable to expect a company to work to standards more stringent than the accepted standards of the day and which had not yet even been formulated by the UK's medical researchers, health and safety practitioners or government health and safety regulators.

[12] At paragraph 3.3 of his report Professor Willey explained that mesothelioma is a cancer found in the lining membrane of the lung, inner chest wall, and some organs of the peritoneum. It had been recognised since the 1920s and was thought to be extremely rare. Medical opinion as to its cause varied and its rarity made it difficult to form a solid opinion. In 1960 a paper appeared in the British Journal of Industrial Medicine in which Wagner, Sleggs and Marchand (based in South Africa) reported to have seen 33 cases of diffuse pleural mesothelioma and that all but one had a probable link to exposure to crocidolite asbestos. Between September 1957 and April 1958 Wagner undertook a fact-finding tour of Europe visiting research units which were involved in occupational diseases of the lung. In all he held discussions with 26 of the leading authorities in occupational medicine research

and attended five major meetings and conferences. Notes of the tours revealed the following facts:

- The rarity of mesotheliomas and the lack of awareness that they may have been connected in any way to industrial exposure were reflected in the fact that none of the experts interviewed mentioned them.
- In his conclusions and suggestions Wagner made no reference to mesotheliomas.
- Four of the experts agreed that an epidemiological survey of asbestos miners in South Africa would be rewarding and fascinating.
- Wagner said that little was known about the toxicity of either crocidolite or amosite dust and the problem could be investigated only in South Africa or West Australia where crocidolite was mined.

The notes suggested to Professor Willey that the medical profession, as represented by the best authorities in occupational lung disease research, did not at the time consider mesothelioma to be a major occupational risk. In a paper presented to the Pneumoconiosis Conference in Johannesburg in 1959 Wagner spoke of the rarity of mesotheliomas and stated that the possible association of diffuse pleural mesotheliomas with asbestosis had not been proved, but he felt that there was sufficient evidence to warrant a fuller investigation of the problem. Many people claimed that the date of the knowledge of mesothelioma being linked to low exposure to asbestos without the preceding asbestosis was when Wagner presented his paper in 1959 in Johannesburg, but in Professor Willey's opinion. Even Wagner was not sure what he had discovered in 1959.

[13] Professor Willey's opinion was that the key dates were 19-21 October 1964, when a major conference on the biological effects of asbestos, attended by medical officers and scientists from all major asbestos producing and manufacturing countries, was held at the

New York Academy of Sciences. In a paper at the conference Wagner stated that on the then current evidence the earlier view that carcinomas of the lung occurred in cases with a significant degree of asbestosis was fully supported, but information was still required to confirm that there was no correlation between exposure *per se* and these tumours. A paper summarising the state of medical knowledge at the conclusion of the conference stated that tumours could develop in the absence of asbestosis in the lungs and sometimes after a small exposure but always with a long or very long delay.

[14] In 1965 Muriel Newhouse and Hilda Thompson published a paper supporting the evidence that mesothelioma could develop after very small, even environmental, exposure to asbestos. That report detailed the first epidemiological study which clearly linked inhalation of asbestos fibres to the “new” disease of mesothelioma and showed that mesothelioma could occur in three different categories, namely, (i) occupational exposure; (ii) relatives of asbestos workers; and (iii) people living in close proximity to an asbestos factory. The publication of the report led the Chief Inspector of Factories to set up a committee to review urgently all the evidence on the medical problems of asbestos exposure. The review led to the enactment of the Asbestos Regulations 1969. In 1965 Dr Alfred Byrne published in the Sunday Times a very well written article which summarised the work of Newhouse and Thompson and arguably put the work and the knowledge into the public domain.

Discussion

[15] I am satisfied from the evidence led and the terms of the joint minutes that Mr Watt developed and died of mesothelioma due to his exposure to asbestos dust while in the employment of Bovis in 1963. The causal link between his mesothelioma and his former

employment was spoken to by Dr Semple and not challenged by counsel for the defenders, who conceded in his closing submission that Mr Watt's mesothelioma was caused by his exposure to asbestos dust while employed by Bovis. I am also satisfied from Mr Watt's statement that Bovis took no steps to prevent injury to him arising out of his exposure to asbestos dust. There was no suggestion that the evidence of Mr Watt in his statement was anything other than credible and reliable.

[16] The issue which I require to focus on in determining whether liability for negligence at common law or breach of Regulation 20 of the 1961 Regulations has been established is that of foreseeability. As counsel for the defenders put it in his closing submission "it all comes down to foreseeability". In order to succeed the pursuers require to prove that it was or ought to have been reasonably foreseeable to the defenders at the material time that the exposure to asbestos to which Mr Watt was subjected gave rise to the risk of asbestos-related injury. In my view it is not necessary, in order to determine that issue, that I should make a finding of the degree of exposure in terms of fibres/ml. The defenders were not aware of the degree of exposure in terms of fibres/ml. Mr Howie accepted that the exposure was not prolonged or heavy. Professor Willey's description of the exposure as secondary, intermittent and low level was not challenged in cross-examination. These statements are not inconsistent and I am content to adopt Professor Willey's description, bearing in mind that the exposure was over a short period of only 3 or 4 days.

[17] In asserting that Bovis should have been aware of the risk of asbestos-related injury in the circumstances of this case from 1960 Mr Howie referred to Wagner's paper in 1961. I found this curious as he did not mention the Wagner paper in his report. In any event, for the reasons given by Professor Willey, I consider that the content of the Wagner report was not sufficient to fix Bovis with foreseeability of asbestos-related injury in the circumstances

of this case. Moreover, in the absence of direct evidence, I doubt that the management of Bovis would at the material time have read or been aware of a research paper in a specialist medical publication.

[18] In moving me to find the defenders liable to the pursuers for Watt's death in the agreed sums counsel for the pursuers made reference to the following cases: *Shell Tankers v Jeromson* [2001] EWCA Civ 101; *Maguire v Harland & Wolff plc* [2005] EWCA Civ 01; *Bussey v 00654701 Ltd* [2018] EWCA Civ 243; *Gibson v Babcock International Ltd* [2018] CSOH 78; *Owen v IMI Yorkshire Copper Tube* (unreported, 15 June 1995); *Gunn v Wallsend Slipway and Engineering Company Ltd* (unreported, 7 November 1988) and *Gregson v Hick Hargreaves & Co Ltd* [1955] 1 WLR 1252. These cases all dealt with the question of foreseeability of injury and turned on their own facts. The foreseeable risk need not be that of mesothelioma.

[19] In submitting that the requisite foreseeability had not been established counsel for the defenders founded strongly on the decision of Swift J in *Abraham v G Ireson & Son (Properties) Ltd and another* [2009] EWHC 1958 (QB). Her ladyship set out from paragraphs 11 to 22 of her judgment the claimant's evidence of the degree to which he was exposed to asbestos while employed by the first and second defendants, not all of which was accepted by her. At paragraph 46 she stated that she was satisfied on the evidence that the asbestos exposure the claimant had with the first defendants was very light and occurred intermittently and that, although his exposure with the second defendants was somewhat more frequent, it was nevertheless modest and infrequent. At paragraphs 85 and 87 her ladyship set out her conclusions on negligence as follows:

"85. ...It seems to me that it was not until after the publication of the Newhouse and Thomson paper in 1965 at the earliest that employers could have been aware that asbestos exposure at the levels to which the claimant was subjected gave rise to a risk of injury.

87. In the circumstances, I am unable to accept that, during the period of the claimant's employment with them, the first and/or second defendants should have appreciated that the claimant was at risk of asbestos-related injury and that their failure to do so and to take appropriate precautions for his safety was negligent."

[20] In relation to the case based on breach of the Regulations she stated at paragraphs 94 and 95 as follows:

"94. Since I have rejected the contention that, during the period of the claimant's employment with them, the first and/or second defendants should have appreciated that the claimant's asbestos exposure was such as to place him at risk of injury, it follows that they cannot have been aware that the asbestos dust was 'likely to be injurious' to the claimant. Further, as I have found that they did not know - and cannot reasonably be expected to have known - of the risk of injury arising from the claimant's exposure to the dust, it cannot have been reasonably practicable for them to take any steps to protect him from it.

95. It follows therefore that I find that the defendants were not in breach of the statutory duties owed to the claimant."

[21] In my judgment the approach of Swift J was correct and I adopt it in considering the circumstances of this case. The degree of exposure to asbestos dust in the present case was certainly no more than the degrees of exposure in the case of *Abraham*. Having considered the evidence of Mr Howie and Professor Willey I have reached the conclusion that it was not until after the publication of the Newhouse and Thomson paper in 1965 at the earliest that employers could have been aware that asbestos exposure at the level to which Mr Watt was subjected gave rise to the risk of injury. I therefore do not accept that during the period of Mr Watt's employment with them Bovis should have appreciated that he was at risk of asbestos-related injury and that their failure to do so and to take appropriate precautions for his safety was negligent. It follows that Bovis could not have been aware that the asbestos dust was "likely to be injurious" to him in terms of Regulation. Further, as they did not know, and cannot reasonably have been expected to have known of the risk of injury arising

from his exposure to the dust it cannot have been reasonably practicable for them to have taken any steps to protect him from it.

Decision

[22] I shall assoilzie the defenders from the conclusions of the summons.