Welcome

Welcome to this week’s edition of BC Disease News.

In the last week, the Court of Appeal has determined that the fixed costs regime applicable to the Pre-action Protocol for Low Value Personal Injury (Employers’ Liability and Public Liability) Claims applied to the costs of an application for pre-action disclosure. Elsewhere, the Department of Health has published its consultation on fixed recoverable costs in clinical negligence claims outlining its plans to limit them to cases worth up to £25,000.

This week, in the second feature of our mesothelioma series, we consider the common law regime and show why exposure to any level of asbestos does not automatically amount to a breach of duty of care.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

Post Portal PAD Applications – Fixed Fees For Clinical Negligence Claims – Discount Rate Review Delay – Cold Calling Ban For CMCs Unlikely - Mesothelioma: Common Law Negligence.
Post-Portal PAD Applications: Sharp v Leeds City Council
[2017] EWCA Civ 33

The Court of Appeal, handing down judgment this week, has determined that the fixed costs regime applicable to the Pre-action Protocol for Low Value Personal Injury (Employers’ Liability and Public Liability) Claims applied to the costs of an application for pre-action disclosure by a claimant—even where the claim had started off under the protocol but was no longer continuing under it when the application was made.

The claimant tripped and fell in February 2014 as a result of allegedly defective paving maintained by the respondent local authority. The claim was started under the EL/PL Protocol but in October 2014, the claim proceeded under the Personal Injury Protocol. The local authority failed to give pre-action disclosure pursuant to the protocol, and the claimant made an application in February 2015 for pre-action disclosure. By the time of the application hearing the defendant had given the necessary disclosure. The district judge then summarily assessed costs in the claimant’s favour at £1,250. The defendant appealed and a judge reduced the costs to £300 on the basis that they were governed by the fixed costs regime applicable to the EL/PL protocol. Notwithstanding the modest amount in dispute, the court allowed a further appeal as the issue as to whether the fixed costs regime applied had important practical consequences in terms of the cost/benefit of making applications for pre-action disclosure.

The Court of Appeal held that the fixed costs regime applied to the costs of an application for pre-action disclosure, as from the moment of entry into the portal, recovery of costs for pursuing or defending the claim was intended to be limited to fixed rates so as to ensure proportionality in the conduct of small or relatively modest claims. The fixed costs regime was subject only to a very small category of clearly stated exceptions. To recognise other, implied, exceptions would be destructive of the regime’s clear purpose. The court said that the clear wording of CPR r.45.29A(1) and r.45.29D supported that conclusion, the latter providing that fixed costs and disbursements were ‘the only costs allowed’.

The claimant submitted that a PAD application was not part of a ‘claim’ for the purposes of the protocol, but instead is a separate and self-contained application, with its own separate jurisdiction, procedural rules and costs regime.

The Court of Appeal agreed that it was self-contained and separate from the claim. However, they held that in a PI context the connections between a PAD application and the claim for damages to which it relates are ‘particularly close’. It stated:

‘The PAD application both responds to a defendant’s default in compliance with its disclosure obligations under the Personal Injury Protocol and operates in furtherance of the damages claim by assisting the claimant in its preparation. It also operates as a means whereby the procedural advantages intended to be conferred on claimants by the Personal Injury Protocol are made good by the court. Above all, the provision of pre-action disclosure powerfully contributes to early settlement, before the issue of proceedings, which is a stated aim of the Protocol.’

As such it concluded that it was sensible for a PAD application to fall within the description of interim applications in Part 45.29H and as such for fixed costs to apply.

Furthermore, the court said it appreciated the argument that limiting costs to fixed costs may deprive pre-action disclosure applications of their value as a ‘spur to compliance’ with protocol disclosure obligations as the fixed costs would refund only a small part of the likely outlay incurred. However, it found that the answer was not to extend the exceptions to the regime but to promote the availability of an application under CPR r.45.29J. This provision allows a claim to be made for an amount of costs (Excluding disbursements) which is greater than the fixed recoverable costs available.

Alternatively, if there was appropriate evidence to show that due to the limited recovery of expenditure on PAD applications, they were becoming less effective in sanctioning breaches of protocol disclosure obligations, then this may justify a review of the position by the CPR Rule Committee.

The appeal was dismissed and the claimant was entitled to recover the fixed fee of £300 for their pre-action disclosure application.

The full judgment can be accessed here.

Fixed Fees For Clinical Negligence Claims Capped

The Department of Health has published its consultation on fixed recoverable costs in clinical negligence claims, outlining its plans to limit them to cases worth up to £25,000 rather than the higher figure of £250,000 originally proposed. The Department released an announcement stating:

‘The government intends to impose a new, fixed cap on all clinical negligence cases up to £25,000 to prevent rising litigation costs within the NHS. There are numerous examples of lawyers who profit from the NHS by charging more than 80 times the amount awarded to the victims in minor claims. The Department of Health has published its consultation on fixed recoverable costs in clinical negligence claims, outlining its plans to limit them to cases worth up to £25,000 rather than the higher figure of £250,000 originally proposed. The Department released an announcement stating:’

The government has anticipated that the new cap will help the NHS save up to £45 million a year. The total bill for the NHS in the financial year 2015 to 2016 was £1.5 billion. Health Secretary Jeremy Hunt stated:

‘It’s important that when significant mistakes happen in the NHS, patients are able to have an open dialogue with a trust about what went wrong, receive reassurance of
what is being learnt, and can discuss what form of recompense or redress may be appropriate. Legal action should only be one part of this process. Unfortunately, what we often see in lower cost claims is a deeply unfair system where unscrupulous law firms cream off excessive legal costs that dwarf the actual damages recovered. We believe this creates an adversarial culture of litigation, which is inflating insurance premiums and drawing away resource from the NHS at a crucial time.

The consultation, which closes on 1 May 2017, has received criticism, although the new lower cap has been met with some relief. In particular The Association of Personal Injury Lawyers stated:

‘The fact that the government has decided to tone down its original plans will come as a relief to injured patients. A fixed-fee regime for more straightforward cases could be workable but the priority has to be the development of a quick and efficient system. It should then be possible to fix legal costs to reflect the speed and efficiency of the new process’.

It went on to say:

‘Above all, we need an end to the “deny, defend and delay” approach by medical professionals when something has gone wrong, which is all too common’.

However, elsewhere, The Law Society president Robert Bourns, remained sceptical of the proposals, stating:

‘We remain concerned that the draft plans could see harmed patients denied the correct level of compensation unless the proposed scheme excludes complex cases and includes exemptions for unusual circumstances. It is also critical that fixed costs are set at a level which is sustainable for expert solicitors to continue to operate in this area…There is a serious risk that those most affected by these proposals would be the vulnerable in society, such as the elderly and people who are disabled, whose cases can be complex and challenging but not necessarily the highest in value’.

The Department of Health has not put forward any proposed figures for the fixed fee, but is seeking views on the methodology that will sit behind them. There are four options, three based on an estimation of legal time required under a streamlined process, and the other based on current market costs.

We will continue to update readers on the progress of this consultation.

Discount Rate Review Delay

The Lord Chancellor, Liz Truss, announced to the London Stock Exchange (LSE) last week that the result of her review of the discount rate for personal injury claims would not be announced, as planned, on 31 January 2017. Instead, it was said that the review had taken ‘longer than anticipated’ and so would not be released until February. No specific date in February has been given.

The full announcement can be found here.

Meanwhile, we reported in edition 170 of BC Disease News that the Association of British Insurers’ (ABI) had failed in its attempt to bring judicial review proceedings in relation to the Lord Chancellor’s decision to change the discount rate. The ABI’s grounds for bringing the judicial review were that the government had not completed the necessary foundation work needed to reach a conclusion on the rate. It pointed out that, despite several consultation exercises and an expert panel being convened, no results have ever been published. The High Court rejected the association’s application.

The ABI has now confirmed that it has been refused permission to appeal last week’s decision of the High Court, as well as an interim injunction to stop the announcement.

We will continue to update readers on the progress of the review of the discount rate accordingly.

Cold Calling Ban For CMCs Unlikely

It has been suggested that a ban on cold calling for claims management companies, would be an effective alternative to the Ministry of Justice’s personal injury reforms. However, this week the government has discredited this proposition with accusations that such a ban would have little effect as those responsible are unregulated anyway.

Justice Minister Sir Oliver Heald, faced questions from shadow justice minister Christina Rees in which she asked whether he would consider the merits of banning claims management companies from making PI cold calls. However, he rebutted the proposition and stated:

‘Claims management companies (CMCs) are already banned from introducing claims, or details of potential claims to solicitors if these have been obtained by an unsolicited approach by telephone or in person. The majority of unsolicited calls for personal injury claims are made by illegal unregulated businesses. Regulators are working together to tackle illegal activity where identified’.

The Claims Management Regulator has released data this week which shows that 29 CMCs engaged with direct marketing were audited and issued with written advice between October and December 2016. Issued advice is provided to a CMC regarding compliance issues, if this is ignored the next course of action is an official warning. Additionally, new investigations were started into five companies and 12 formal investigations were progressing in relation to possible breaches of rules around nuisance calls, texts and emails.
Feature

Mesothelioma Feature: Part 2: Common Law Negligence

INTRODUCTION

We have seen in part 1 of this series of features that the relaxed test of causation in asbestos related mesothelioma claims does not extend into the other remaining essential elements of establishing liability.

So the claimant must prove (i) exposure on a balance of probabilities, (ii) the exposure was in breach of duty, (iii) the exposure in breach of duty materially contributed to the risk of injury and was more than de minimis and (iv) loss and damage suffered as a result of injury and which is within the usual ‘remoteness rules’.

Breach of duty may be established in common law and / or statutory duty. In some mesothelioma claims only common law negligence will apply with issues of reasonable foreseeability to be determined. In others there may be co-existing statutory duties. Sometimes these statutory duties relate to generic workplace risks-such as harmful ‘dust’ and ‘fumes’ and sometimes specific asbestos legislation will apply. Sometimes the statutory duties will import notions of foreseeability and simply ‘mirror’ the common law duty of care. Sometimes the statutory duties will involve a more onerous duty of care which does not involve any consideration of foreseeability.

In this and next week’s features we consider the common law regime only and show why exposure to any level of asbestos does not automatically amount to a breach of duty of care.

WHERE THERE IS DEVELOPING KNOWLEDGE

In common law an employer must take reasonable care for the reasonable safety of its employees from a foreseeable risk of injury. The test is the conduct of the reasonable and prudent employer taking positive thought for the safety of its workers in light of what it knows or ought to know (actual or constructive knowledge) - see Stokes v Guest Keen and Nettlefold (1968)1 and Thompson v Smiths Shirepairers (1984). 1 That is the test unless it can be proven that a particular employer had a heightened or better appreciation than the objectively reasonable employer.

Our knowledge of the risks associated with respirable exposure to asbestos has developed over the last century or so.

In the mesothelioma claim of Asmussen v Filtrona (UK) Ltd (2011)1 guidance given by the Supreme Court in Baker v Quantum Clothing Group Ltd (2011)1 was applied:

‘…In an area of developing knowledge, an employer was entitled to rely on recognised and established practice at the time. Foreseeability of injury should not be judged with the benefit of hindsight and likewise depends on standards of the time’.

The issue of breach at common law depends upon the knowledge of risks, advice and standards prevailing at the time. As was said by Simon J in Asmussen:

‘…foreseeability of injury is to be tested against the standard of the well-informed employer who keeps abreast of the developing knowledge and applies his understanding without delay, and not by the standard of omniscient hindsight. An employer can rely upon a recognised and established practice to exonerate itself from liability in negligence for failing to take precautionary measures unless (a) the practice is clearly bad practice, or (b) …the particular employer acquired greater than average knowledge of the risks’.

This was subsequently endorsed by Lord Justice Aikens in the Court of Appeal decision of Williams v University of Birmingham (2011), 1 in which the deceased, a student at the defendant university, died of malignant mesothelioma, allegedly as a result of being exposed to asbestos whilst carrying out scientific experiments in a tunnel under the university buildings which contained pipes lagged with asbestos lagging. The university appealed against a decision that it was liable to the estate and dependents of the deceased on the grounds that it could not reasonably have foreseen that allowing him to carry out the experiments would expose him to the risk of an asbestos-related injury. In determining the correct test for breach of duty, the court stated:

‘In the context of the present case, I would formulate the test for whether the University was negligent and in breach of duty in the following manner. 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. That brings me to the second important point. The understanding of asbestos-related diseases and the extent to which exposure to even very small quantities of asbestos fibres can have dire consequences has grown over the years. The question of what the University ought reasonably to have foreseen about the consequences of any exposure to asbestos fibres in the course of experiments in the tunnel and the reasonable conduct that the University ought to have adopted must be judged by reference to the state of knowledge and practice as at 1974.’

Williams has been followed in subsequent first instance mesothelioma decisions in which the claims were dismissed. For example, in McGregor v Genco (2014),1 in which the court was required to determine whether the defendant employer was liable in negligence for the mesothelioma of the claimant who was employed as a sales assistant in a department store and exposed to asbestos from the removal of old escalators which were being removed in 1976. Patterson J referred to Williams and concluded that she was unable to accept ‘that the defendant should have appreciated that the claimant was at risk of
an asbestos related injury and that their failure to appreciate and take what would now be regarded as appropriate precautions or make enquiries about the nature of the dust was negligent'.

Similarly, in McCarthy v Marks & Spencer (2014), the court found that the defendant company had not breached its common law duty of care in respect of a worker who had developed mesothelioma following exposure to asbestos while working at its premises between 1967 and 1990. The judge referred to Williams and said at paragraph 90 that:

'I do not consider that, assessed by the standards of the time, that it was reasonably foreseeable that the defendant should have appreciated 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 agreed were involved'.

The importance of the 'standards of the time' can be illustrated here by considering the decision in a secondary exposure mesothelioma case, Maguire v Haarland & Wolf (2005), in which the deceased was exposed to asbestos fibres between 1961-1965 from washing contaminated work clothes of her husband who was employed by the defendant and was himself significantly exposed whilst working in boiler and engine rooms of ships. At para 21, Lord Justice Judge, identified the dangers of hindsight when criticising historic omissions of employers. He stated:

'When considering criticisms of actions and omissions forty years ago we have, always, to warn ourselves against the wisdom of hindsight, and recognise the potential unfairness of using knowledge accumulated during the last forty years which, by definition, was not available to the defendants. It has taken a very long time indeed for the true extent of the dreadful risks posed by exposure to asbestos dust to become known. As we shall see, the learning process has been gradual, beginning with those most obviously at risk, employees whose work directly involved such exposure'.

He then went on to conclude, after a thorough analysis of the documentation available at the time of the deceased's exposure, that there was nothing in the specialist safety, medical or factory inspectorate literature to alert the defendant to the risk of secondary exposure. The risk was only identified in literature in 1965. As such the Court of Appeal held that in a scientifically developing field the risk was not foreseeable.

More recently, in Woodward v Secretary of State for Energy & Climate Change (2015), also a secondary exposure mesothelioma claim where the deceased developed mesothelioma from the clothes of other workers, the court applied the test in Williams and concluded that in determining whether the employee could have reasonably foreseen a risk of injury to the deceased from their exposure, that consideration must be had to the standards of the time. The standards of the time in this case were set out in Technical Data Note 13 first issued in 1970 and accompanying the Asbestos Regulations 1969. However, the claimant sought to distinguish Williams on the grounds that in the current case the employer had specific guidance from the Asbestos Research Council, of which it knew, or ought to have known, and that guidance was that contaminated clothing should not be taken into clean areas, or into canteens. As such, it was submitted, that the exposure limit in Technical Data Note 13 was irrelevant and that because of the accepted risk of mesothelioma which was recognised the claimant should succeed.

The judge made an important distinction between a risk of injury and foreseeability of injury. He stated:

'Not all risk of injury is sufficient to make injury foreseeable. As I said, the risk of mesothelioma was well known in the 1970s. It was, or should have been, known to the University of Birmingham and 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'.

As such the question was, did the defendant have reason to believe that there was sufficient risk of the deceased developing mesothelioma if she was exposed to asbestos from the clothing of other workers, and what is regarded as a sufficient risk has to be judged by the standards of the time, and those standards were set out in this case in Technical Data Note 13.

This principle of distinguishing between foresight of risk and foresight of injury is perhaps best illustrated in the House of Lords decision of Bolton v Stone [1951] AC 850, where a cricket ball hit out of the cricket ground hit a passer by. In that case it was said by Lord Porter that:

'...it is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must be also such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it'.

It is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it-The Wagon Mound (No.2) [1967] 1 AC617 as per Lord Reid at 642-3.

This principle that not all foreseeable risk will equate to foreseeable harm was very recently underlined by the Court of Appeal in Dean & Chapter of Rochester Cathedral v Leonard Debell (2016). This case concerned a tripping accident at Rochester Cathedral. The court found that the cathedral was not liable in negligence as the nature of the risk did not pose a real danger to pedestrians. Lord Justice Elias stated:

'It is important to emphasise, therefore, that although the test is put by Steyn LJ in terms
of reasonable foreseeable harm, this does not mean that any foreseeable risk is sufficient. The state of affairs may pose a risk which is more than fanciful and yet does not attract liability if the danger is not eliminated. The observations of Lloyd LJ in

James v Preseli Pembrokeshire District Council [1993] P.I.Q.R. P114, a case which applied the test in Mills, are pertinent:

“In one sense, it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury. But that is not the test of what is meant by ‘dangerous’ in this context. It must be the sort of danger which an authority may reasonably be expected to guard against.”.

FORSEEING A PARTICULAR INJURY?

The employer does not need to foresee a particular type or form of disease - just personal injury. So, for example, mesothelioma only came to be known to medical science in 1960. Before that it was an unrecognised condition. So if an employer ought to have foreseen a risk of asbestosis from negligent exposure in the 1950s - at a time when mesothelioma was unknown - but the employee goes on to develop mesothelioma in the future, then there is no foreseeability defence in those circumstances - see Page v Smith [1996] AC 177 at para 170.

As was said by Russell LJ at para 361 in Margereson v Roberts [1996] PIQR P365, a public liability case concerning alleged exposure from a factory operated by the defendant in a suburb in Leeds in which the claimant lived from 1925 to 1957:

‘...liability only attaches to these defendants if the evidence demonstrated that they should reasonably have foreseen a risk of some pulmonary injury, not necessarily mesothelioma’.

In Jeromson v Shell Tankers UK Ltd [2001] I.C.R 1223, the defendant appealed against a finding that it was liable in negligence for the deaths of two former employees who had developed mesothelioma following prolonged exposure to asbestos in the 1950s when the existence of mesothelioma was unknown. The Court provided some guidance on how to determine whether an employer ought to reasonably have foreseen risk of pulmonary injury:

‘The issue in this case is not one of balancing the effectiveness, expense and inconvenience of the precautions required against the extent of the risk: the issue is whether the risk should have been identified. With the benefit of hindsight, it is now quite clear that the exposure in these cases was sufficient to cause mesothelioma, the disease from which Mr. Dawson and Mr. Jeromson eventually died. But the link between asbestos and mesothelioma was not established until 1960. Until then the known risk was of lung disease, in particular asbestosis, and, in the 1950s, lung cancer associated with asbestos. The issue was whether the degree of exposure in this case was such that reasonable employer should have identified a risk’.

HOW KNOWLEDGE DEVELOPED

So how has knowledge of the risks associated with asbestos developed? What information was available to the reasonable and prudent employer over time?

The 1930 publication by the Home Office of the ‘Report on the effects of asbestos dust on the lungs and dust suppression in the Asbestos Industry’ (Merewether and Price) really marked the start of the public understanding of the dangers associated with inhalation of asbestos dust and established a clear link between long-standing and heavy exposure and the risk of asbestosis. Although the report was directed towards the manufacturing industry it also referred to workers exposed in other industries. It provided no information about what might be a ‘safe’ level of exposure.

A detailed chronology of industry guidance and developing knowledge of the risks and harm associated with asbestos is provided in our mesothelioma guide published at the end of this series of features, but in very simple terms the development can be summarised in the table below:

<table>
<thead>
<tr>
<th>DATE / PERIOD</th>
<th>RISK IDENTIFIED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1930</td>
<td>Asbestosis from heavy and prolonged exposure. Research confined to textile workers but identified workers in other industries exposed to asbestos dust as also at risk. Risks from lower exposures unknown.</td>
</tr>
<tr>
<td>1940s</td>
<td>Asbestosis concern raised for ship building and ship repair industries.</td>
</tr>
<tr>
<td>1950s</td>
<td>Lung cancer associated with asbestosis</td>
</tr>
<tr>
<td>1960</td>
<td>Mesothelioma - its existence was first recognised within medical literature.</td>
</tr>
<tr>
<td>1962-1964</td>
<td>Mesothelioma - association made with slight exposures to asbestos</td>
</tr>
<tr>
<td>1965</td>
<td>Mesothelioma from secondary exposures, such as family members exposed to work clothes of primary exposed person contaminated with asbestos or living within half a mile of asbestos factory.</td>
</tr>
<tr>
<td>October 1965</td>
<td>Mesothelioma - Public awareness raised through the October Sunday Times ‘Killer Dust’ article.</td>
</tr>
</tbody>
</table>
EXPOSURE LIMITS

How was an employer to determine whether there was a foreseeable risk of injury from respirable exposure to asbestos?

Recommended UK workplace exposure limits to hazardous substances have existed since 1960 and have been variously called ‘Threshold Limit Values’, ‘Hygiene Standards’, ‘Control Limits’ and have been based on continuous 8 hour or 4 hour or 10 minute exposure periods.

It was not until 1960 and publication of a booklet, ‘Toxic Substances in Factory Atmospheres’ by the Ministry of Labour, that any industry guidance on asbestos exposure limits was provided. Based on a ‘normal working day’ the maximum permissible concentration for asbestos was 177 particles per cubic centimetre of air (ppcc) – referred to as Threshold Limit Value. Updated editions of the booklet were published in 1966 and 1968 which were now called ‘Dust and Fumes in Factory Atmospheres’. The Threshold Limit Value was now expressed as an 8 hour time weighted average of 5 million particles per cubic foot (mppcf) – essentially the same as the previous limit of 177 ppcc. Note that the Threshold Limit Value in these 3 publications was the same for all types of asbestos fibres – no distinction was made between the different fibre types reflecting the lack of knowledge then as to their differing carcinogenic potencies.

Then in March 1970 Technical Data Note 13: Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969, was published which accompanied the 1969 Asbestos Regulations. Now for the first time distinction was made between the different fibre types. Chrysotile (white) and amosite (brown) asbestos shared the same 4 hour time weighted average of 5 million particles per cubic foot (mppcf) – essentially the same as the previous limit of 177 ppcc. Note that the Threshold Limit Value in these 3 publications was the same for all types of asbestos fibres – no distinction was made between the different fibre types reflecting the lack of knowledge then as to their differing carcinogenic potencies.

Crocidolite (blue) asbestos had a limit set at a 10th of this at 0.2 fibres/ml reflecting knowledge of its greater carcinogenic potency.

It is important to note that the threshold limit values pre 1970 were expressed in units of particles per cubic centimetre (ppcc) and from 1970 in units of fibres per millilitre - ‘fibres/ml’¹. It is not entirely clear how these units relate to each other and how to accurately convert units of ppcc to fibres /ml. This uncertainty means that the pre 1970 TLV expressed as a fibres/ml equivalent is thought to be anywhere between 5-30 fibres/ml.

This uncertainty was expressed in Maguire where Lord Justice Judge, sitting in the Court of Appeal made the following comments regarding the conversion of threshold limit values:

‘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 United States of America. In the United Kingdom the equivalent figure would be expressed in fibres per millilitre. We understand that the method of converting one of these calculations into the other is not straightforward, in the sense that there is “no universally accepted factor”. 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’.

In December 1976 Technical Data Note 13 was replaced by the HSE Guidance Note EH10, which gave revised criteria which the HSE was to adopt in determining whether the requirements of the 1969 Asbestos Regulations were being observed. However for the first time there was the recommendation that ‘exposure to all forms of asbestos dust should be reduced to the minimum that is reasonably practicable’.

EH10 was updated in 1983 which gave more positive guidance on what could be done to reduce exposure to ‘the minimum that is reasonably practicable’. Now for the first time positive guidance was given as to the use of respirators.

The hygiene guidance limits for asbestos between 1960-1990 are shown in the table below and extracts from key guidance is shown in the appendix to this feature.
## TABLE: Exposure Limits of Asbestos Dust

<table>
<thead>
<tr>
<th>DATE &amp; DOCUMENT</th>
<th>TYPE OF STANDARD</th>
<th>LIMIT VALUES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>March 1960</strong></td>
<td><strong>Threshold Limit Value (TLV)</strong></td>
<td><strong>CHRYSOTILE</strong> 177 ppcc as 8 hour TWA</td>
</tr>
<tr>
<td><strong>1966 Dust and Fumes In Factory Atmospheres, Ministry of Labour</strong></td>
<td></td>
<td><strong>AMOSITE</strong> 5 mppcf (=177 ppcc) as 8 hour TWA</td>
</tr>
<tr>
<td><strong>1968 Dust and Fumes In Factory Atmospheres, Ministry of Labour</strong></td>
<td></td>
<td><strong>CROCIDOLITE</strong> 2 mppcf/12 fibres/ml as 8 hour TWA</td>
</tr>
<tr>
<td><strong>March 1970 and January 1971 Technical Data Note 13 (TDN 13), Department of Employment and Productivity</strong></td>
<td><strong>'Standard for Asbestos Dust for use with Asbestos Regulations 1969'</strong></td>
<td><strong>CHRYSOTILE</strong> 2 fibres/ml (4 hour TWA) or 0.2 fibres/ml (10 minute TWA)*</td>
</tr>
<tr>
<td><strong>January 1974 TDN 13 Rev</strong></td>
<td><strong>'Hygiene Standards for Airborne Dust Concentrations for use with Asbestos Regulations 1969'</strong></td>
<td><strong>CHRYSOTILE</strong> 2 fibres/ml (4 hour TWA) or 0.2 fibres/ml (10 minute TWA)*</td>
</tr>
</tbody>
</table>
| **December 1976 HSE Guidance Note EH10** | **'Hygiene standard'** | **CHRYSOTILE** As TDN (above) but subject to “exposure to be reduced to the minimum reasonably practicable” requirement. This requirement applies to all subsequent standard setting documents below.
| **April 1983 HSE Guidance Note EH10** | **Control Limit** | **CHRYSOTILE** 1 fibres/ml (4 hour TWA) or 0.5 fibres/ml (4 hour TWA) or 0.2 fibres/ml (4 hour TWA)
| **July 1984 HSE Guidance Note EH10** | | **CHRYSOTILE** 0.5 fibres/ml (4 hour TWA) or 0.2 fibres/ml (4 hour TWA)
| **February 1988 HSE Guidance Note EH10** | | **CHRYSOTILE** 0.5 fibres/ml (4 hour TWA) or 0.2 fibres/ml (4 hour TWA) or 0.6 fibres/ml (10 min TWA)
| **June 1990 HSE Guidance Note EH10** | **Exposure Limit** | **CHRYSOTILE** As February 1988

*NOTE: The standards pre 1970 are expressed in units of particles per cubic centimetre. Standards from 1970 are in units of fibres/ml. The conversion between units is unclear. It is generally thought that pre 1970 limits are the equivalent of between 5-30 fibres/ml.

**ARE EXPOSURE LIMITS 'SAFE' OR 'PERMISSIBLE' LEVELS OF EXPOSURE?**

How are these exposure limits to be treated by employers? Did they represent ‘safe’ or ‘permissible’ levels of asbestos exposure? Did the reasonable employer comply with its common law duties of care if exposure was below any relevant limit? Or was the duty a more precautionary one to reduce exposure not just below any limit but as far as reasonably practicable?

These are questions which we will be addressing in next week’s feature.
APPENDIX: ASBESTOS HYGIENE STANDARDS 1960-1990

TOXIC SUBSTANCES IN FACTORY ATMOSPHERES 1960
TOXIC SUBSTANCES IN FACTORY ATMOSPHERES

INTRODUCTION
By Section 47(1) of the 1937 Factories Act all practicable measures are to be taken to protect persons employed against inhalation of any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious.

This booklet offers suggestions to occupiers of factories and others concerned. It deals with points relating to all practicable measures to protect against inhalation and it gives information about certain dusts and fumes known to be of such a character as to be likely to be injurious if inhaled. The information given is not exhaustive and expert advice should always be sought in any case of doubt or difficulty.

In some cases the hazards and the proper precautions against them are well known and understood. But with the increasing complexity of industrial processes new substances are coming into use.

The first step in all cases is to know what substances are being used and the possible hazard involved. It is of prime importance always to be on the look-out for a possible hazard and to bear in mind the possible need for precautions; for example, by seeing that labels on containers and instructions for use are properly examined, understood and observed.

PERMISSIBLE CONCENTRATIONS
While systems of control should be as effective as it is practicable to make them, it is desirable to have some guide to which the efficiency of the control measures can be related. In the List at the end of this booklet there are set out figures of maximum permissible concentrations of certain substances used in industry. For each substance a figure of concentration in atmosphere is given. If this concentration is exceeded, further action is necessary to achieve satisfactory working conditions. The List also serves as a general indication of the relative degrees of toxicity of these substances.
## MINERAL DUSTS

<table>
<thead>
<tr>
<th>Substance</th>
<th>PPCC $</th>
<th>Substance</th>
<th>PPCC $</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aluminium oxide</td>
<td>1766</td>
<td>Silica</td>
<td>177</td>
</tr>
<tr>
<td>Asbestos</td>
<td>177</td>
<td>high (above 50% free SiO$_2$)</td>
<td>177</td>
</tr>
<tr>
<td>Dust (nuisance, no free silica)</td>
<td>1766</td>
<td>medium (5 to 50% free SiO$_2$)</td>
<td>706</td>
</tr>
<tr>
<td>Mica (below 5% free silica)</td>
<td>706</td>
<td>low (below 5% free SiO$_2$)</td>
<td>1766</td>
</tr>
<tr>
<td>Portland cement</td>
<td>1766</td>
<td>Silicon carbide</td>
<td>1766</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Soapstone (below 5% free SiO$_2$)</td>
<td>706</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Talc</td>
<td>706</td>
</tr>
</tbody>
</table>
INTRODUCTION

It is a requirement of section 63(1) of the Factories Act 1961 that, in every factory where any process is carried on giving off dust, fumes or other impurities of such a character as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, the occupier shall take all practicable measures to protect the persons employed against inhalation of the dust or fume. This booklet offers some guidance in methods of meeting this statutory obligation—by enclosing the process, by providing local exhaust ventilation, by using personal protective equipment and by general ‘good housekeeping’. Attempts should however always be made in the first place to use as a substitute the least harmful material possible. In all circumstances the aim should be to reduce the concentration of dust or fume in the atmosphere to the lowest practicable level.

We reproduce in this booklet, by permission, a list adopted by the American Conference of Governmental Industrial Hygienists at their meeting in May 1965, of ‘threshold limit values’ for a number of substances which may be injurious or offensive if absorbed in the form of dust or fume. A condition of reproduction of this list is that it should be published in entirety and without amendment, and careful attention should be given to the Preface which explains the thinking behind it. It must be remembered that it is based on experience, practice and research in the United States. Because of the difference in climate, genetic and industrial conditions in this country, and because certain materials may be obtained from different sources of supply, British experience is not always the same and,

THRESHOLD LIMIT VALUES FOR 1965

Adopted at the 27th Annual Meeting of the
American Conference of Governmental Industrial
Hygienists
Houston, Texas,
May 2-4, 1965

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The American Conference of Governmental Industrial
Hygienists will welcome requests for permission to re-
publish or reprint these Threshold Limit Values. Requests
for such permission should be directed to the Secretary-
Treasurer, 1014 Broadway, Cincinnati, Ohio 45202.

The 2nd edition of the Documentation of Threshold Limit
Values, rewritten and greatly enlarged to include the
approximately 400 substances in the list will be available
shortly and may be purchased from the Secretary-
Treasurer. The Documentation should be consulted when
using the Threshold Limit Values herein.

Single Copies—30 cents

RESPIRABLE DUSTS EVALUATED BY COUNT

| SUBSTANCE | ACGIH 
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>SILICA</td>
<td>ppmf *</td>
</tr>
<tr>
<td>Crystalline</td>
<td>225**</td>
</tr>
<tr>
<td>Quartz, Threshold Limit calculated from the formula</td>
<td>94% FeO + 2%</td>
</tr>
<tr>
<td>Cristobalite</td>
<td></td>
</tr>
<tr>
<td>Amorphous, including natural diatomaceous earth</td>
<td>20</td>
</tr>
<tr>
<td>SILICATES (less than 1% crystalline silica)</td>
<td></td>
</tr>
<tr>
<td>Asbestos</td>
<td>20</td>
</tr>
<tr>
<td>Mica</td>
<td>5</td>
</tr>
<tr>
<td>Soapstone</td>
<td>20</td>
</tr>
<tr>
<td>Talc</td>
<td>20</td>
</tr>
<tr>
<td>Portland Cement</td>
<td>50</td>
</tr>
<tr>
<td>Graphite</td>
<td>15</td>
</tr>
<tr>
<td>‘INERT’ or Neutrally Particles</td>
<td>50 (or 15 mg/m² whenever is the smaller)</td>
</tr>
</tbody>
</table>

Conversion factors:
| ppmf x 35.3 = million particles per cubic meter |
| = particles per c.f. |

* Million of particles per cubic foot of air, based on impinger samples counted by light-field technique.
** The percentage of crystalline silica in the formula is that removed from airborne samples, except in those instances in which other methods have been shown to be applicable.
INTRODUCTION

It is a requirement of section 63(1) of the Factories Act 1961 that, in every factory where any process is carried on giving off dust, fume or other impurity of such a character and to such an extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind; the occupier shall take all practicable measures to protect the persons employed against inhalation of the dust or fume. This booklet offers some guidance in methods of meeting this statutory obligation—by enclosing the process, by providing local exhaust ventilation, by using personal protective equipment and by general 'good housekeeping'. Attempts should, however, always be made in the first place to use as a substitute the least harmful material possible. In all circumstances the aim should be to reduce the concentration of dust or fume in the atmosphere to the lowest practicable level.

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It is intended to republish the present booklet each year, with the American threshold limit values for that year as an Appendix.

The threshold limit values for some of the respirable dusts evaluated by count are under active consideration at the present time, and so also is the possible use of gravimetric methods for their estimation. These values have been based on impinger sampling techniques whereas in the United Kingdom other methods are commonly used.

The threshold limit value given in this booklet for asbestos is the American value. In the United Kingdom it is proposed to introduce new Asbestos Regulations shortly, and for the purposes of these Regulations the American figure quoted should be regarded as a ceiling value.
# MINERAL DUSTS

<table>
<thead>
<tr>
<th>SUBSTANCE</th>
<th>mppcf($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>SILICA</td>
<td></td>
</tr>
<tr>
<td>Crystalline</td>
<td></td>
</tr>
<tr>
<td>**Quartz, Threshold Limit calculated from the formula ... ... ... ... ... $%SiO_2 + 5$</td>
<td>2500</td>
</tr>
<tr>
<td>**Cristobalite</td>
<td></td>
</tr>
<tr>
<td>Amorphous, including natural diatomaceous earth</td>
<td>...</td>
</tr>
<tr>
<td>Tremolite</td>
<td>...</td>
</tr>
<tr>
<td>SILICATES (less than 1% crystalline silica)</td>
<td></td>
</tr>
<tr>
<td>**Asbestos</td>
<td>...</td>
</tr>
<tr>
<td>Mica</td>
<td>...</td>
</tr>
<tr>
<td>Soapstone</td>
<td>...</td>
</tr>
<tr>
<td>Talc</td>
<td>...</td>
</tr>
<tr>
<td>Portland Cement</td>
<td>...</td>
</tr>
<tr>
<td>GRAPHITE (natural)</td>
<td>...</td>
</tr>
<tr>
<td>‘Inert’ or Nuisance Particulates</td>
<td>...</td>
</tr>
<tr>
<td>see Appendix D</td>
<td></td>
</tr>
</tbody>
</table>

Conversion factors

mppcf $\times 36.3 =$ million particles per cubic meter

mppcf = particles per c.c.

## NOTICE OF INTENDED CHANGES (Continued)

<table>
<thead>
<tr>
<th>SUBSTANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>+ Asbestos</td>
</tr>
</tbody>
</table>
Standards for Asbestos dust concentration for use with the Asbestos Regulations 1969

Part I

Section 1

(a) Where the average concentration of asbestos dust over any 10 minute sampling period is less than 8 fibres/cu cm or 8 mg/m³, H.M. Factory Inspectors will not seek to enforce the substantive provisions of the Regulations, in particular regulations 7 and 8. Where the concentration is 2 fibres/cu cm, or 0.8 mg/m³ or more, but not more than 10 fibres/cu cm or 0.6 mg/m³, further sampling over a four hour period will be carried out to determine whether the average concentration of asbestos dust still exceeds 2 fibres/cu cm or 0.8 mg/m³.

(b) Where the average concentration of asbestos dust over a four hour sampling period exceeds 12 fibres/cu cm or 9.6 mg/m³, H.M. Factory Inspectors will not seek to enforce the substantive provisions of the Regulations, in particular regulations 7 and 8.

(c) Where the average concentration of asbestos dust over any 10 minute period exceeds 12 fibres/cu cm or 9.6 mg/m³, 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 and 8.
References


5 1 WLR 1776.

6 1984 QB 405.

7 2011 2 All ER 42.

8 2011 UKSC 17.


Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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