Keoghs

Client ALERT

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Bussey v Anglia Heating
Mesothelioma and Minimal Exposure: *Williams* upheld - for now.

The High Court has rejected an attempt to circumvent the Court of Appeal's decision in *Williams**. Defendants can continue to resist low exposure asbestos claims from the 1960's and early 1970's - but this is a moving target. This decision will not be the last word.

The background

The deceased was employed between 1965 and 1968. He cut cement pipes made with chrysotile. He also used asbestos rope which contained amosite. There was some dispute between the experts as to the likely asbestos exposure. The judge found that the levels of exposure were *'very limited in time'* and *'low level'*. He found specifically that the exposure would have been below the levels set out in Techical Data Note (TDN) 13: *Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969*.

The TDN 13 guidance was issued by the HSE in 1970 to accompany the 1969 Asbestos Regulations. It set out levels of exposure which would be expected to lead to prosecution. In the 2011 *Williams* case the Court of Appeal found that TDN 13 should be seen as the best guide to what would have been regarded as acceptable levels of asbestos exposure. If they were not exceeded the defendant would have had no foresight of harm and would not be in breach of duty.

In *Bussey* the deceased's exposure predated TDN 13 - but the Judge said it would be *'perverse'* to think that standards would have relaxed over that time. The claimant argued that *Williams* was wrongly decided. She said that earlier authorities had set out a more stringent test and the Court of Appeal did not seem to have been taken through these cases. Their decision was therefore a legal error.

The Judge in *Bussey* did not address the underlying issues about the correct test to apply.

He said that any argument that the Court of Appeal was wrong in *Williams* could only be addressed by that Court. He was bound by it and found for the defendant.

The issues in *Bussey* will largely be relevant to exposure between 1965 and 1976. In 1965 knowledge of the potential dangers of low level exposure and mesothelioma became '*public*'. In 1976 the HSE issued fresh guidance (EH10) saying that asbestos exposure should be reduced to the lowest level reasonably practicable. The *Williams* decision will not help defendants after that point.

Whether this claimant or another continues this challenge remains to be seen. Many observers believe that *Williams* has had a significant dampening effect on claim numbers. Using TDN 13 as a guide to reasonable foresight of harm in the 1960's and 1970's is certainly questionable. These standards did not purport to be a guarantee of safety. They were also based on the risks of asbestosis, not mesothelioma and on the use of chrysotile only. Their status as a sole litmus test of foreseeability does seem flawed.

The implications

Where this might lead is an open question - which invokes other questions. What was the true state of reasonable knowledge of SME employers in, say, 1968? How would a small plumbing business even know about TDN 13? Claimants still carry the burden of proof, even in mesothelioma claims. Setting aside TDN 13 might not necessarily turn out to the claimants' advantage.

For further information, please contact:

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* Williams v University of Birmingham & Anor [2011] EWCA Civ 1242 Court of Appeal, 28 October 2011