IN THE COUNTY COURT AT NORWICH **Claim No. B22YP724**

The Law Courts
Bishopgate
Norwich
NR3 1UR

Thursday, 20th April 2017

Before:

HIS HONOUR JUDGE MOLONEY QC

Between:

PHILLIP OLDMAN
(EXECUTOR OF THE ESTATE OF BERTIE OLDMAN)

Claimant

-v-

DEFRA

Defendant

Counsel for the Claimant: MISS ABIGAIL HOLT
Instructed by Higgins & Co

Counsel for the Defendant: MR JAMES TUNLEY
Instructed by the Treasury Solicitors

APPROVED JUDGMENT

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JUDGMENT

HIS HONOUR JUDGE MOLONEY QC:

1. This is my judgment on liability, the quantum having been agreed subject to liability. It is a claim brought by the estate of the late Mr Bertie Oldham to whom I will refer as 'the claimant' though technically the action is brought by his son, Phillip Oldman, as executor of his later father's estate. The claim is brought against DEFRA, the successor of MAFF, the Ministry of Agriculture, Fisheries and Food, which employed the claimant for many years. The claim is for negligence and breach of statutory duty. The act complained of is permitting the claimant to be exposed to asbestos in the course of his employment with result that he contracted pleural thickening and consequent respiratory problems.

2. The chronology is as follows:

(a) The claimant was born in 1926;

(b) His first job was as a seaman in the Royal Navy during the war. Between 1946 and 1950, he worked for a coachbuilder in Lowestoft. He may have been exposed to asbestos in either of those employments. There is no evidence one way or the other;

(c) In 1951, he joined MAFF as a sailor on a fishery research vessel based in Lowestoft. No later than 1954, he was working on the ship's engines; by 1956, he had been given a certificate recording his two years' experience working on steam engines;

(d) His first research vessel was the Sir Lancelot, a converted steam trawler built during the war. In the early 1960s, the Sir Lancelot was replaced by a purpose-built diesel ship and the claimant retrained as a diesel engineer;

(e) His long and distinguished service was rewarded in 1980 by the award of the British Empire Medal. The nature of his duties, so far as they may have involved contact to asbestos, will be considered later;

(f) In about 1983, he retired from the sea but he continued to work for MAFF as a night watchman for some years after that;

(g) By about the age of 65, he was fully retired. Then he had a long life in retirement, much of it living alone after his wife's death. His son and daughter-in-law lived nearby and helped him in his later years;

(h) In about 2005, he began to use a hearing aid for his deafness which then gradually increased;

(i) From 2010, by which time he was 84 years of age, he began to suffer from respiratory problems;

(j) In December 2012, he was diagnosed with pleural thickening. At that time, his medical notes record him as denying that he had worked with or had been exposed to asbestos. By 27th December 2012, he was saying no, he had not worked with

asbestos, but he had been told that he had been exposed to it on the ships he worked on. It is not known who told him that;

(k) By December 2013, his medical notes record, "Asbestosis as worked in marines," (probably a mistake or shortening for marine engineering). His condition was not technically asbestosis but it was asbestos-related. At this time also he was beginning to show the early signs of dementia;

(l) In January 2014, he successfully applied for disability benefit on the ground of respiratory disease. He told the person who filled in his application form that he had worked as a marine engineer for many years and he said this:

> *"We used to lag pipes but we did not know that we were working harmful substance, asbestos. We did not have dust protection at that time."*

(m) In 2014, he was no longer able to live by himself and he moved to a retirement home;

(n) By March 2015 he was in contact with his present solicitors. He gave them a witness statement, the contents of which are considered below. In April 2014, he was seen by his medical expert in this case, who prepared the medical report that I shall refer to, and in October 2015 he signed the particulars of claim which give some further details of his work;

(o) Sadly, very shortly thereafter, on 13th November 2015 he died at the age of 89 and this action is now being carried on by his estate.

3. The claimant puts his case in two ways:

(a) Common law negligence; and

(b) Breach of regulations, specifically the Ship Building and Ship Repairing Regulations 1960 and the Asbestos Regulations 1969.

4. As to the regulations, I am not persuaded that, strictly speaking, they apply to this case. The 1960 regulations apply to work done in a ship yard, or to work done in a harbour or wet dock. The claimant's case is that he carried out work on asbestos lagged pipes whilst at sea and also by way of repair and maintenance while the ship was in harbour. A ship yard is a place where ships are built or repaired. I am not satisfied that the claimant ever worked in such an establishment. So far as work in a harbour or wet dock goes, the regulations do not apply to work done by the masters or crew of ships. Similarly, the 1969 regulations apply to ships only in so far as they are covered by section 126 of the Factories Act 1961. Section 126(3) of that Act says, "Nothing in this Act shall apply to work done by the master or crew of ships." I conclude, in the light of those provisions, that both sets of regulations are primarily intended to apply to professional dock workers and persons of that kind, but not to the masters or crews of ships who typically work in very different conditions from those applicable to shipyards and dockyards. Those regulations are, however, relevant to liability at common law because they give some indication of the state of knowledge

and good practice in relation to asbestos at the material times, which could be relevant to the existence and breach of a duty at common law.

5. Common law negligence, of course, involves:

(a) Proof of the existence of a duty of care, generally by reference to the foreseeability of harm to a defined person such as an employee from the activity in question;

(b) Proof of breach of that duty, generally by failure to take reasonable care to prevent that harm; and

(c) Proof of personal injury, caused by that breach of duty.

The burden of proof in each respect set out above is on the claimant.

6. As to the existence of a duty of care, this depends largely on the state of knowledge of the risks caused by exposure to asbestos, at the time when that exposure occurred. In the present case, there are two main relevant periods of the claimant's employment by MAFF which seem to me to be in issue:

(a) The period from 1951 to the early 1960s when he worked on the elderly steam vessel, the Sir Lancelot; and

(b) From the 1960s onwards when he was working on the more modern diesel vessels.

No doubt there was asbestos on both sorts of ship, but I consider it probable that the amount of asbestos and the need to disturb it while working on lagged pipework, as the claimant describes, was materially greater in the first period when working on the steamboat than later on.

7. The evidence is clear, however, that the risks of exposure to asbestos in respect of work on ships was well-known from at least the year 1945:

(a) I have been shown a copy of a 1945 letter or memorandum from the Chief Inspector of Factories recording that exposure to asbestos will cause serious diseases in later life and also recommending on board ships the use of ventilation and damping down of dust and the provision of respirators for those fitting or removing asbestos ;

(b) I have also been shown a report prepared in 1971 by Surgeon Commander Harris. That records a survey he carried out in 1967 on warships under refit. He found that there were high concentrations of asbestos dust arising when one was applying pipe insulation and lagging. The precautions he recommended for those carrying out such work to a minor degree on a ship (as opposed to fulltime asbestos workers) include the use of protective clothing, respirators, and showering after work. The 1960 regulations and the 1969 regulations are entirely consistent with this developing state of knowledge during the relevant period.

8. In the case of *Jeromson [2001] EWCA Civ 101*, the Court of Appeal considered the case of two marine engineers working between the years 1951 and 1961 in the engine rooms of ships. Their work included stripping away insulation, especially when leaking joints needed repairs. (The present claimant's witness statement, to which I

shall refer below, deals with his carrying out similar work.) The Court reviewed the literature, including the literature to which I have referred, showing that in the period from 1951 to 1960, the threats posed by exposure to asbestos were sufficiently well-known for employers to be under a duty to reduce their employees' exposure to asbestos to the greatest possible extent. The Court noted that during the 1950s, if an expert had been consulted about how to carry out that duty, he would have recommended the provision of respirators for persons working on asbestos. The Court of Appeal also confirmed in the *Jeromson* case the critical point that all that is required for liability is knowledge that the exposure is likely to cause some form of pulmonary disease. It is not necessary for the employer to foresee or understand the precise nature of that disease, e.g. mesothelioma as opposed to pleural thickening. *Jeromson* appears to me to be precisely in point so far as the fact situation alleged in this case is concerned. It has set out clearly the nature and extent of the duty to be expected a responsible ship-owner, here a government department, towards its employed marine engineers in the 1950s. In later years, the duty can only have become stronger. The defendant rightly referred me to the line of authorities represented by the case of *Williams v University of Birmingham [2011] EWCA Civ 1242* but what those cases address is a rather different question: what is an employer's duty in respect of a very low level of exposure, capable of causing the cancer, mesothelioma, but not of causing other respiratory diseases such as pleural thickening? Though *Jeromson*, as it happens, was also a mesothelioma case, on the facts in that case the level of exposure was much higher than that in issue in the *Williams* case, and it appears to me that the findings there, specifically relating to the marine engineering environment, are more applicable to this case.

9. I therefore conclude that at all material times, the defendant owed its engineers a duty to reduce their risk of exposure to asbestos to the greatest extent possible. There is a dearth of evidence on either side about this, but the claimant does indicate in his benefit application form which I have read that he was not aware at that time of the fact that he was working with asbestos, or at least that asbestos was dangerous, and also that he was not provided with dust protection, a phrase which I would take to include respirators and other things such as perhaps protective clothing. I will consider his credibility or, more accurately, the credibility of his witness statements further below in respect of causation, but if I accept that evidence, which was given before he had any contact with solicitors, then it would strongly suggest that the defendant did not take any steps to reduce exposure to asbestos when its engineers were working on insulation or lagging, or to protect its engineers from such exposure. If it failed to take any such precautions, then of course it would be in breach of the duty that I have outlined.

10. The final question is that of causation. Can the claimant satisfy me, on the balance of probabilities, that he was in fact exposed to asbestos, while working for the defendant, as the result of the breach of duty of the kind that I have outlined and that it was this exposure which was the cause of his pleural thickening?

11. The starting point in this enquiry is the medical evidence. The claimant's expert witness is Dr Lawrence. His report was not challenged by the defendant. He states that pleural thickening can occur with quite low levels of asbestos exposure by comparison, for example, of that required for asbestosis. I note that in *Jeromson*, the marine engineers are described by the court has having been intermittently exposed to

high levels of asbestos whilst working on the pipes, and I consider that this is likely to have been the same in the case of the claimant. Dr Lawrence goes on to say that the specific pattern of the claimant's symptoms strongly points to causation by asbestos as opposed to, for example, heart failure or heavy smoking (both of which are present in the claimant's history). These medical findings appear to me themselves to constitute evidence to support the probability that the claimant had been exposed to asbestos at some time in his life, and that that exposure was the cause of his illness.

12. The next question, before I come to consider the claimant's own witness statements, is whether there are any other possible sources in the claimant's past which might be consistent with asbestos exposure to such an extent as to render it unlikely that it was his work for MAFF that was the cause. I cannot rule out the possibility of asbestos exposure during his Royal Navy Service in the war, or while working at the coachworks in Lowestoft, but there is no positive evidence either way. The 1945 letter, the Harries report, and the review of the authority of the material in *Jeromson* all give rise, however, to a clear picture: that, in the 1950s, ships were a strong source of asbestos and that the work of engineers on lagged pipes was particularly likely to expose them significantly to asbestos. Therefore, even without considering the claimant's direct evidence, it would appear, on the balance of probabilities, that his work for MAFF was the source of his exposure to asbestos and the cause of his disease.

13. Finally, however, we come to consider the claimant's own evidence which is relied on in different respects by both sides. His evidence falls into three categories:

    (a) His 2012 statements to his doctors that he had <u>not</u> been exposed to asbestos;

    (b) His early 2014 statement to the benefits office that he had worked on lagged pipes but <u>did not know</u> they contained harmful asbestos; and

    (c) His particulars of claim and witness statement in this action, which go into some detail about his carrying out work on lagged pipes and, indeed, his being covered with dust whilst working and even when back in his cabin.

14. The defendant asked me to accept that of these statements, the earliest one, the statements at (a) to the doctor in 2012, represents the probable truth. By the time of the later statements, the claimant's dementia was advancing. How could his recollection have improved and changed so dramatically between his repudiation of asbestos exposure in 2012 and his positive testimony about it in 2014 and 2015?

15. The claimant's son puts forward the view that his father's deafness may have led him to give wrong answers to the doctors in 2012 in an attempt simply to terminate the interview and get out of hospital. I am not able to accept this. No-one suggests that the claimant was a stupid man; he understood at that time the importance of telling one's doctors the truth, and the records show that he understood the questions. The deafness theory has no validity.

16. In my view, the 2014 benefit questionnaire is the most reliable document so far as recording his actual state of knowledge is concerned. It is consistent with what he said to the doctors in 2012 in this respect. He knew what sort of work he had done, lagging pipes; but in 2012 he did not realise that that work involved asbestos and the dangers

of asbestos. Later, he did find out more about it and realised that his work had probably involved asbestos exposures. So he first claimed benefit, and later consulted solicitors with a view to the present claim. I do not therefore consider the statement that in 2012 he was unaware that he had been exposed to asbestos as positive evidence that he had not been exposed to asbestos, merely as evidence that he did not realise it at that time and found out about it later.

17. By 2015, he was living in a residential home and, indeed, was quite near his death. If his then witness statement and particulars of claim stood alone, I would agree with the defendant in viewing them with some degree of scepticism. They might have been the fruit of leading questions, put by solicitors familiar with the *Jeromson* case itself. But in fact, the account he then gives is entirely consistent with the picture that emerges from his statement to the benefits authority, and from the earlier general material that I have referred to about the likely nature of the duties of a marine engineer in the 1950s and the high risk of exposure to asbestos that that work would involve.

18. For the above reasons, my conclusions on the balance of probabilities are that:

(1) The claimant's pulmonary condition was caused, on the balance of probabilities, by exposure to asbestos whilst working as a marine engineer for MAFF; and

(2) That that exposure, in turn, was the result of a breach of duty by MAFF in failing to provide the claimant with adequate protection when working on asbestos-lagged pipes.

For those reasons, I determine the issue of liability in the claimant's favour and propose to give judgment for the agreed sum, which I believe is £50,050.

[Argument and ruling on costs follows]