



Case No: HQ18Q01130

[2019] EWHC 238 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
11 February 2019

Before :
HHJ WALDEN-SMITH
Sitting as a Judge of the High Court

Between :

JOHN CAREY
(as representative of the Estate of Lydia Carey)
- and -
VAUXHALL MOTORS LIMITED

Claimant

Defendant

JOHN-PAUL SWOBODA (instructed by Royds Withy King) for the Claimant
PAUL BLEASDALE QC and STEPHEN GLYNN (instructed by Moran & Co) for the
Defendant

Hearing dates: 3, 4, 5 and 6 December 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ WALDEN-SMITH, sitting as a Judge of the High Court:

Introduction:

1. This claim was brought against the Defendant Vauxhall Motors Limited (“Vauxhall”) by Mrs Lydia Carey on 27 March 2018. Directions were made by Master Eastman on 20 July 2018 for an expedited trial. Mrs Carey died on 27 November 2018, a matter of days before the liability only trial was listed to commence. Mr John Carey did not seek an adjournment of the trial, but sought an order whereby he could continue the claim in his own name or as Personal Representative for his late wife. There had, of course, been no grant of probate and I therefore ordered that, as her executor and sole beneficiary under the terms of her will, Mr Carey be appointed to represent the estate of Mrs Carey pursuant to the provisions of CPR part 19.8(1)(b).
2. The claim brought against Vauxhall is for damages for injury arising from the biphasic mesothelioma she suffered and which resulted in Lydia Carey’s premature death.
3. It is alleged on her behalf that she inhaled asbestos fibres that were carried home by her husband during the period that he was working in Vauxhall’s vehicle manufacturing factory at Dunstable (“the Dunstable factory”). While a number of issues were admitted by Vauxhall, including that Lydia Carey was suffering from biphasic mesothelioma arising from exposure to asbestos fibres of dust, and that Vauxhall owed her a duty of care, it is denied by Vauxhall that there was any breach of the duty to take reasonable care to protect Lydia Carey from the risk of exposure to asbestos. It is further denied by Vauxhall that her exposure to asbestos was such that there was a material risk of her contracting mesothelioma.
4. I have been assisted in this case by both the written and oral submissions of Counsel for both the Claimant and the Defendant. As I indicated to Counsel at the end of the hearing I took time to read through the 2000 plus pages in the trial bundle in order to have a full understanding of the documentary evidence available. Counsel for the Claimant referred to a particular document after the hearing had finished. Counsel for the Defendant did not object to the reference to a document within the trial bundle but responded by referring to further documents in the trial bundle and to witness statements referred to by the Claimant. With agreement of Counsel for both Claimant and Defendant I have taken those brief post hearing submissions into account.

The Relevant Time Period

5. John Carey started a four-year apprenticeship with Vauxhall on 3 September 1973. In common with the other witnesses I heard who had undertaken an apprenticeship with Vauxhall, John Carey spent his first year at the airport school at Luton. Thereafter he spent a short time in the Luton factory before moving to the Dunstable

factory. He completed his apprenticeship on 2 September 1977 and continued to work for Vauxhall at the Dunstable factory until 22 June 1979. The majority of his work was in the DA Block, although not exclusively so.

6. John Carey met Lydia in August 1976. They were married on 1 July 1978.
7. The relevant period for the purpose of considering whether Lydia Carey was exposed to asbestos dust from Vauxhall by reason of it being transferred to her by John Carey is the period August 1976 through to June 1979.
8. As is set out above, Vauxhall do not seek to deny the existence of a duty of care towards Lydia Carey and do not seek to deny that asbestos is the causative agent for mesothelioma. What is denied by Vauxhall is that Lydia Carey's exposure to asbestos was by reason of a transfer of asbestos from John Carey being exposed to asbestos while working at the Dunstable factory. It is said by Vauxhall that John Carey was not exposed to significant asbestos on a routine basis and that any exposure to asbestos as he may have encountered was on an occasional basis, and that any exposure was both transient and minimal.
9. Vauxhall contend that the Dunstable factory was not the source of the asbestos which led to Lydia Carey suffering from mesothelioma. Instead, Vauxhall contend that on the balance of probabilities, Lydia Carey was exposed to asbestos from the clothes of her father when he was working for George Kent Limited/Kent Industrial Instruments Limited/ Kent Instruments Limited/Kent Process Control Limited ("Kent") during the period 1961/1962 until she left home to marry John Carey in 1978. Further or alternatively to Kent being the source of the asbestos, Vauxhall contend that Lydia Carey, on the balance of probabilities, was exposed to asbestos when John Carey worked for Satchwell Control Systems Limited ("Satchwell") during the period 1979/80 through to 1985/86. No claim has been brought against either Kent or Satchwell. As I understand the situation, there would be no purpose in bringing any such claim as neither continue to trade and neither have assets or insurance to cover any damages that might be awarded against them. A theme of the defence to this claim is that Mr Carey has gradually concentrated his claim on Vauxhall as the source of the asbestos as Vauxhall is the only remaining viable defendant. I do not consider that to be a fair description of the manner in which this claim has been brought.
10. It is, of course properly open to Vauxhall to seek to suggest that the exposure to asbestos was by reason of transmission from her father when he was working for Kent and/or from her husband when he was working for Satchwells, but any such finding would not necessarily avoid liability on the part of Vauxhall. The joint statement of Dr Robin Rudd and Dr Christopher Davies, the consultant physicians instructed to report on Lydia Carey by the Claimant and Defendant respectively, provides that:

"... the development of malignant mesothelioma is rare in people who have not been exposed to asbestos and in the majority of cases there is evidence of either direct or indirect exposure to asbestos. Mesothelioma can develop after low level exposure to asbestos, and there is no threshold dose of asbestos below which there is no risk."

Liability can be found against any Defendant who negligently exposed an individual to asbestos to such an extent which made a material contribution to the risk of contracting mesothelioma.

The Law

11. Vauxhall properly accepts that it owed a duty of care to Lydia Carey.
12. The duty owed to someone in the position of Lydia Carey, who could be subjected to secondary exposure, has been well established by *Magereson v JW Roberts Ltd* [1996] PIQR 358 and *Maguire v Harland & Wolff Plc* [2005] EWCA Civ 01, and recently re-iterated in *Gibson v Babcock International Ltd* [2018] CSOH 78.
13. In *Magereson*, Russell LJ referred to Lord Lloyd in *Page v Smith* [1996] 1 AC, 190 where he said:

“The test in every case ought to be whether the Defendant can reasonably foresee that his conduct will expose the Plaintiff to the risk of personal injury. If so, then he comes under a duty of care to that Plaintiff. If a working definition of “Personal Injury” is needed, it can be found in section 38(1) of the Limitation Act 1980. “Personal Injuries” includes any disease and any impairment of a person’s physical or mental condition.”

and further, approving the words of Holland J at first instance:

“...there is nothing in the law that circumscribes the duty of care by reference to the factory wall ... if the evidence shows with respect to a person outside the factory that he or she was exposed to the knowledge of the defendants, actual or constructive in terms of dust emissions not materially different to those giving rise within the factory to a duty of care, then I can see no reason not to extend to that extramural neighbour a comparable duty of care,”

In *Maguire v Harland & Wolff*, Mance LJ (in the minority) held:

“The law should not require absolute precision about the identity of the persons to whom injury might reasonably foreseeably be caused. It seems to me sufficient that Harland and Wolff’s conduct, in allowing Mr Maguire to become excessively contaminated to a quite unnecessary extent and to leave the yard in that state, clearly expanded the risks of asbestos to an extent which might affect third parties as well as Mr Maguire himself outside their yard.”

and, Judge LJ (expressing the majority view) that

“The principle approved in Maggerson and Hancock in relation to environmental exposure to asbestos dust has

potential application to cases of familial exposure. In summary, a family member is not precluded from establishing liability based on environmental contamination with asbestos dust. In an appropriate case, the environmental principle may apply to members of an employee's family as to anyone else living in the immediate vicinity of premises working with asbestos..."

14. In *Gibson v Babcock*, Lady Carmichael's Opinion in the Outer House, Court of Session (while not binding) provides as follows: "*I consider that from 31 October 1965 at latest, the defenders ought reasonably to have foreseen that a risk of injury arose to persons in the position of the deceased by reason of their employees transporting asbestos dust home on their clothing*". Vauxhall accept that it had knowledge at the relevant time that exposure to more than de minimis or trivial amounts of asbestos gave rise to a risk of injury to someone in the position of Lydia Carey.
15. However, Vauxhall deny that there was any significant exposure to asbestos and contend that John Carey's exposure to asbestos was nothing more than "transient and minimal and neither a foreseeable risk to him nor to the Claimant", and thereby deny the alleged breach of duty to Lydia Carey.
16. Vauxhall have pointed to both Kent and Satchwell as the potential sources of exposure to asbestos which resulted in the development of mesothelioma as a consequence of what Mrs Carey has said in her evidence. Mrs Carey's evidence, by way of her three witness statements, provide that she was not directly exposed to asbestos either while at school or during her own working life. She does refer to the fact that she came into contact with asbestos through contact with her father as he would come home in his overalls and she would hug him when he came in and she would assist her mother with the laundering of her father's work clothes and overalls. Additionally, she refers in her statements to her personal contact with John Carey both before and during their marriage when he was working at Vauxhall, and later at Satchwell, and how that personal contact and the shaking out and laundering of his work clothes would mean she was exposed to the dust he brought home from both places of work, but particularly Vauxhall.
17. Asbestos is the causative agent in virtually all cases of mesothelioma and, as has recently been reiterated by Jackson LJ in *Bussey v 00654701 Ltd* [2018] EWCA Civ 243, the Court of Appeal in *Maguire* held that alarm bells sounded in late 1965 "*when it began to be appreciated that there could be no safe or permissible level of exposure, direct or indirect to asbestos dust*" and, referring to the experts' joint reports in *Bussey* that, "*From the mid-1960s there was knowledge that exposure to relatively small quantities of asbestos dust, in particular crocidolite, was associated with a risk of developing mesothelioma. It is generally agreed that this became common knowledge in 1965 following publication of an article by Newhouse and Thompson which received national press coverage.*"
18. There would be no dispute in this case if Mrs Carey could only have been exposed to asbestos through her husband for the period he was working at Vauxhall between 1976 and 1979. However, as it is currently impossible to identify the particular "guilty" fibre or fibres, all employers are subject to the duty to take reasonable care to

prevent exposure of its employees, and members of their families, from inhaling the asbestos that might cause mesothelioma. The court has to consider whether Vauxhall fulfilled its duty to take reasonable care by taking all practicable measures to prevent Lydia Carey from inhaling asbestos dust, through contact with their employee John Carey, in light of the known risk that asbestos dust, if inhaled, might cause mesothelioma. That is the case regardless of any potential exposure attributable to either Kent or Satchwell.

19. Lord Bingham in *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 dealt with this difficult issue in these clear terms:

“If (1) C was employed at different times and for differing periods by both A and B and (2) A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C from inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma, and (3) both A and B were in breach of that duty in relation to C during the period of C’s employment by each of them with the result that during both periods C inhaled excess quantities of asbestos dust and (4) C is found to be suffering a mesothelioma, and (5) any cause of C’s mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted, but (6) C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A or during his employment by B or during his employment by A and B taken together, is C entitled to recover damages against either A or B or against both A and B?”

...where conditions (1)-(6) are satisfied C is entitled to recover against both A and B. That conclusion is in my opinion consistent with principle, and also with authority (properly understood). Where those conditions are satisfied, it seems to me just and in accordance with common sense to treat the conduct of A and B in exposing C to a risk to which he should not have been exposed as making a material contribution to the contracting by C of a condition against which it was the duty of A and B to protect him. I consider that this conclusion is fortified by the wider jurisprudence reviewed above. Policy considerations weigh in favour of such a conclusion. It is a conclusion which follows even if either A or B is not before the court.”

20. Lord Phillips in *Sienkiewicz v Grief* [2011] UKSC 10 provided:

“The rule in its current form can be stated as follows: when a victim contracts mesothelioma each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating a “material increase in risk of the victim contracting the disease

will be held to be jointly and severally liable for causing the disease.”

21. What is meant by a “material” contribution was referred to by Lord Reid in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 621 where, in the context of the source of the disease arising from silica dust from more than one source, he said as follows:

“...the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis no curat lex is not material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material. ”

22. The two expert physicians instructed in this case, Dr Christopher Davies a consultant in respiratory and general internal medicine, and Dr RM Rudd a consultant with specialist accreditation in respiratory medicine and medical oncology, agreed that it is rare to find malignant mesothelioma in people who have not been exposed to asbestos and that normally there is evidence of either direct or indirect exposure. As set out above, they are also agreed that mesothelioma can develop after low level exposure to asbestos and that there is no threshold dose of asbestos below which there is no risk. The experts consider it unlikely that her exposure to small amounts of chrysotile in the course of her own employment at AC Delco could be the cause of the mesothelioma and that the potential exposure to asbestos resulting in the development of mesothelioma were from her father when he worked at Kent and/or from her husband when working at Vauxhall and/or Satchwell. Vauxhall is, therefore, potentially responsible.
23. Vauxhall accept that asbestos was present in its Dunstable plant in significant quantities – in particular in high pressure hot water pipework, in lagging, in calorifiers, firescreens, heat treatment units (this evidence is contained in, amongst other places, the statement of Mr Dutton who was not called to give evidence) and in ceiling tiles. Vauxhall do not accept that they exposed Mrs Carey, through her husband, to more than de minimis amounts of asbestos. Vauxhall further positively contend that reasonable precautions were taken to prevent exposure to asbestos. In particular, Vauxhall contend that an outside specialist contractor was instructed to remove asbestos from the factory. Vauxhall further contend that there was an “overalls scheme” whereby each worker had three sets of overalls which were then laundered by Vauxhall so that any potential transmission of any dirt, dust or fibres would be reduced significantly.
24. It is a fact-finding exercise for the court to determine in any particular case whether the defendant has exposed the injured party with significant, that is more than de minimis, levels of asbestos. In this case there is a great deal of conflicting evidence from the witnesses as to the state of the Dunstable factory and the possibility of transference of asbestos fibres onto the skin, hair and clothes of the workers and from them secondary transfer to friends and family.

25. As Mrs Carey died very shortly before the trial I have accepted her evidence in its written form, although taking into account that there would have been particular areas of that evidence – such as her description of John Carey being “always dusty and dirty” when working at Vauxhall and that she would shake out his clothes “in order to get rid of the worst of the dust” and then wash his work clothes in a twin tub – that Counsel for Vauxhall would have wished to cross examine her upon. It is notable that in her very first statement, dated 29 October 2017, when Mrs Carey is describing all the possible sources of asbestos, she refers to her husband being in contact with asbestos throughout his working life “particularly at Vauxhalls.” This statement goes some way to rebut the suggestion by Vauxhall that the concentration on Vauxhall as the source of the asbestos is merely because it was the only remaining viable defendant. Vauxhall was being highlighted as a source of asbestos from her first statement – although it was always acknowledged there were potentially other sources.
26. In her second statement, after she had been asked to give further details of her washing of her husband’s work clothes when he was at Vauxhall, she described how she did not do the laundry until they got married but that, once they were married, she did wash his work clothes. She said that she remembers washing blue overalls as well as washing the clothes he had worn underneath. She said that she thought that he did not always wear overalls and just wore his own clothes and that while she could not be sure of that she thought it because “his normal work clothes were often so filthy that I could not imagine he had been wearing anything on top of them.” She said that his overalls and work clothes would get washed about once a week through a twin tub. The mechanics of such a machine meant that the clothes would swirl around in a tub of water before being pulled out to go into a spinner. There is ample opportunity during that process, together with the shaking off of the dust from the clothes, for any asbestos fibres to be transferred. Mrs Carey described John Carey’s work clothes as being greasy and sometimes black with dust, depending on the work he had been doing and that they were “often covered with a greyish white dust ... ingrained in his work clothes where he had obviously been rubbing against the dusty object, and there would also be dust and debris in the turn-ups of his trousers.” She said that she would knock out and brush off as much of the dust as possible and would then wash his clothes in the twin tub.

Overalls

27. Mrs Carey’s evidence is consistent with the evidence that was given by John Carey. In his first statement, Mr Carey referred to having boiler suits to wear but that he could not recall if they were taken home to wash although he did say that there was “often lots of dust and dirt” and that there was dust (which he now believes to include asbestos fibres) on his own working clothes and in his hair. In his second statement John Carey set out that he did have use of overalls with a laundry service during the first year of his apprenticeship, which started on 3 September 1973, but that when he moved over to the Dunstable factory he did not stay with the voluntary laundry service for long – partly because of the cost and partly because, as a smaller man, he found that they did not often have his correct sizes.
28. Others who gave evidence on behalf of Vauxhall, such as Mr Chalmers, Mr Hitchings and Mr Larkins, said that they did not know anyone who was not part of the circulatory overalls scheme and that, to their knowledge, there was never a problem

with overalls being replaced with clean ones. Thousands of employees worked at the Dunstable plant in the late 1970s and it is unrealistic to suggest that it could be known (or recalled) back to the mid to late 1970s (some 40 years ago) what everyone was wearing. Neither Mr Chalmers nor Mr Larkins were in charge of the overalls scheme and neither could say definitely whether everyone used the scheme. Mr Derek Hitchings, who was responsible for the operation of the “Circulatory Overalls Scheme”, was not called to give evidence and therefore not subjected to cross examination but even he conceded in his witness statement that he could not say whether Mr Carey made use of the overalls scheme or not. Given Mr Hitchings evidence, it was plainly not a compulsory scheme and it is therefore quite possible that Mr Carey was not making use of the overalls scheme.

29. The experience of Mr Chalmers and others may well have been that they never had a problem with their overalls being replaced, but I accept Mr Carey’s evidence that he himself found the scheme to be unsatisfactory (maybe because of his size) and relatively expensive, so he did not stay in the scheme for long. Vauxhall are asking me to find that Mr Carey either has a misrecollection of the true situation or that he is deliberately lying with respect to his use of overalls. I do not find either submission sustainable. Mr Carey will have a much better recollection of what he was doing at that time, particularly as this was an important and significant time in his life. He had started an apprenticeship at Vauxhall as an electrician, a highly sought-after and prestigious apprenticeship, and in August 1976 he had met his future wife. He is much more likely to remember how he was behaving at that time than anyone else. I accept his evidence, given in the course of cross-examination, that he would sometimes meet his wife while wearing overalls which he sometimes wore home, and sometimes he would meet her when he was in work clothes. He said that he had not been advised that it could be dangerous to take overalls home to be washed and no evidence was adduced to rebut that assertion.
30. Mr Hodge, who gave evidence at court, said that the scheme was not a free scheme by the time he left in 1975. He said that there was not a universal take up for the scheme because of the cost and because no advice had been given that it was necessary for safety. Mr White, who gave evidence on behalf of Vauxhall, said that he thought all electricians and maintenance workers wore overalls but also gave evidence that a deduction was made from the wages of those on the scheme. Mr Cutler, who also gave evidence for Vauxhall, said that while he did not know anyone who didn’t use the overalls scheme he could not say that everyone did make use of it. Given that combination of evidence, and Mr Carey’s clear personal evidence, I accept what he says about not being in the Circulatory Overalls Scheme (a title he says he did not recognise) and that he did not wear overalls on all occasions. I also accept that when he did wear overalls he would either put them in his locker to wear the next day or sometimes wear them home where they would be washed by his wife.
31. In any event, it has not been specifically pleaded that those working in the factory were being made to wear these overalls in order to protect themselves from potential exposure to asbestos. While it is pleaded that they could be made “dust tight” that is not supported by the evidence. While Mr Chalmers said the overalls could be “secured” when there was dirty work being undertaken, this falls short of them being “dust tight”. On the evidence, these were not overalls that were designed to prohibit any dust or fibres from getting onto the skin or on clothes worn underneath and there

was no evidence that they were elasticated around the wrists or ankles. These were overalls which assisted in keeping home work clothes clean. Mr Carey says that there were times in the summer when he would tie the overalls around his waist as it was too hot, although some of the witnesses doubted that would happen. If Mr Carey did ever tie his overalls around his middle then I do not accept that he did so when on the factory floor as to do so would be too dangerous around machinery. What is clear to me is that the overalls, even when worn, would not have provided a complete barrier to dust and dirt getting onto clothes worn underneath. Further, hair was not being kept covered and, while there is some evidence of showers at the Dunstable plant, it was not suggested that the employees were ever instructed that it was necessary for the workers to shower at the end of a shift.

32. Mr Carey graphically described the mass exodus of thousands of workers from Dunstable when the whistle sounded at the end of the shift. I am satisfied that the Vauxhall workers did not hang back once their shift finished in order to shower. I am also satisfied that it was not realistic for security to have been stopping anyone who was wearing overalls home. While he was forcefully cross-examined on this issue, I am satisfied that Mr Carey has accurately recalled that, whatever others may have been doing, he was, at least for part of the time, wearing his overalls home to be washed.
33. I am satisfied that any dirt and dust that Mr Carey was in contact with in the Dunstable plant would get on to the overalls and be carried home with him. I am also satisfied, from the evidence I have heard, that dirt and dust would also get onto Mr Carey's work clothes (albeit limited when he was wearing overalls over the top), onto his skin and into his hair. That dust would transfer to Mrs Carey at home either by virtue of her shaking out his clothes (and she describes how it would be caught into the turn-ups of his overalls which he had to turn up as they were too long for him) or through her laundering of his clothes. I am satisfied that from 1976, when they were spending intimate time together, and through to the time he left Vauxhall, when Mrs Carey was also carrying out his laundry, there was a transfer of dust to Mrs Carey from John Carey's clothes, skin and hair.
34. Counsel for Vauxhall accepted, as he was bound to, that the court is entitled to reach common sense conclusions on the evidence. It is a clear and common sense conclusion that dirt or dust that Mr Carey was exposed to would be transferred onto his overalls and/or onto his work clothes and onto his skin or hair and that he would take that dirt and dust home with him, thereby exposing Mrs Carey. That conclusion is positively supported by the evidence of Dr Rudd, instructed by Vauxhall who concluded that a crucial point was whether or not he took his overalls home for laundering as "*a very large majority of any dust which got into his clothing is likely to have been trapped by his overalls. A very small amount of dust might have got onto his clothes which he wore beneath his overalls and a small amount of dust might have been trapped in his hair, particularly if he was disturbing asbestos ceiling tiles overhead.*"

Potential exposure to asbestos

35. Having determined that dirt and dust that Mr Carey was exposed to at work would have been transported home to Mrs Carey, the next important issue is whether that dirt and dust, to which Mrs Carey was exposed, contained significant (that is greater

than de minimis) asbestos fibres which thereby created a material increase in the risk of Mrs Carey contracting mesothelioma. Dr Rudd seeks to set out in his report that if, during his employment with Vauxhall, the court were to find that he was only exposed to low airborne fibre concentrations by virtue of lifting ceiling tiles then that would have only resulted in a very small exposure to Mrs Carey when laundering his clothes – estimated by Dr Rudd to be less than 1% of the total dose of asbestos which Mrs Carey received from all sources. That submission is being relied upon by Vauxhall, but there is not sufficient evidence available to give support to Dr Rudd’s assumptions about the level of exposure through her father when he was employed by Kent or through John Carey when he was employed by Satchwell. Dr Rudd did not have the evidence from Kent or Satchwell to enable him to say that her exposure to asbestos fibres which originated from the ceiling tiles at Vauxhall was less than 1% of the total exposure. Rather than dealing with this issue on assumptions, it is necessary to consider what, if any, was the exposure of Mr Carey to asbestos within the Dunstable plant and, as a consequence, what was Mrs Carey’s potential exposure and whether it was a material risk.

36. In summary, what is said by Vauxhall is that while there was asbestos in the Dunstable plant, Mr Carey was not being exposed to it in a significant way and that consequently there was not a material increase in the risk to Mrs Carey. Vauxhall do not accept that the conditions at the Dunstable plant were as described by Mr Carey. Mr Chalmers’ evidence was that the plant was cleaned regularly and thoroughly and that Mr Carey’s working conditions were neither “filthy” or very dusty, as described by Mr Carey in his evidence.
37. The evidence given by Mr Carey and his witnesses, John Hodge (who was an apprentice and then maintenance electrician like John Carey) and Jim McMahon (who was a cleaner who then worked on the production line and then in rectifications) was that the Dunstable plant was “crawling” with asbestos and that the “whole factory was held together with asbestos”. The maintenance electricians worked on many different machines which involved them in “disturbing considerable levels of asbestos and sending airborne asbestos dust into the atmosphere” and John Carey said he would frequently be “working in clouds of dust”, which he now believes to have contained asbestos. He described that they would sometimes have to walk through, kneel or even lie in dust in order to carry out the work.
38. The witnesses called by Vauxhall were George Chalmers, the general foreman of maintenance within DA block and DE Block during the relevant period; Terence White, who worked as a maintenance electrician at the Dunstable plant between 1970 and 1984; Mr Larkins, Mr Nicholas Cutter and Mr Michael Williams, another maintenance electrician whose evidence I allowed, even though it was adduced late. Other statements were provided from Mr Thompson, Mr Dutton, Mr Brownin, Mr Bidaudville and Mr Hitchings. A decision was taken by Counsel for Vauxhall not to call these witnesses and they were consequently not subjected to cross-examination. Insofar as those statements have not been referred to by Claimant’s counsel they are not evidence before the court. Insofar as they have been referred to by Counsel for the Claimant then the statement is before the court but I am mindful of the fact that it was a conscious decision not to call those witnesses, not a forced situation as it was in the case of Lydia Carey, and that the Claimant would have wished to have asked a

number of questions about that evidence. The weight given to those statements is therefore very limited.

39. On initial consideration of the written statements there were a number of very stark differences between the evidence supporting the Claimant's case and the evidence called to support the Defendant's case. However, after oral evidence was given and various witnesses underwent the scrutiny of cross examination, there were areas where it was possible to reach conclusions supported by the oral and documentary evidence provided by both sides.
40. It is uncontroversial that there was asbestos within the Dunstable plant. There are two central matters to determine: what asbestos was in the factory in the relevant period 1976 to 1979 and what had been removed by that time; and secondly, whether Mr Carey was exposed to asbestos through being in close proximity to others who were working with asbestos or reapplying asbestos or whether he was exposed to asbestos by clearing up and working with asbestos himself. Vauxhall contend there was little asbestos remaining in the 1970s and that Mr Carey had very limited exposure to it.

What asbestos was in the Dunstable plant and what was Mr Carey's exposure

41. I have concluded, having considered all the evidence presented to me with care, that at the relevant time of Mr Carey working at Vauxhall, between 1976 and 1979, there was still a considerable amount of asbestos in the Dunstable factory. One of the witnesses graphically said that the Dunstable factory was "held together" with asbestos. Vauxhall make the obvious point that, just because there is asbestos present, that does not mean that there was any significant exposure but, for the reasons I set out, I have concluded that Mr Carey's exposure to that asbestos was significant and not de minimis as Vauxhall have sought to suggest. While, as an electrician, Mr Carey may not have been required to work directly with asbestos lagging I have concluded that he would be working in close proximity and exposed to the asbestos.
42. It is clear from the evidence of the witnesses called on behalf of Vauxhall and on behalf of Mr Carey that there were a number of potential sources of significant asbestos exposure.
43. A principal source of alleged asbestos exposure was the lagging used on the hot water pipes. Hot water was piped through a large 12-14" pipe which was suspended high into the apex of the ceiling. From that high pressure hot water pipe other, smaller, pipes cascaded down to service the machines that required hot water. These machines included washing machines and door blowers which were all maintained by the electricians.
44. It was accepted by Vauxhall that the large high pressure hot water pipe was lagged with asbestos but denied that there would be any requirement for the electricians to go up to that large pipe in DA block. Both Mr Hodge and Mr Carey gave evidence that they did go up to that pipe from time to time, resting their 30-foot ladder against the pipe – Mr Hodge even went so far as to say that he would sometimes crawl along it. I do not accept that evidence. The other witnesses I heard from said that there was no need for the electricians to go up so far and that they would not be putting their ladders against that pipe – not least because it was not securely fixed to the wall but

was hanging down from the ceiling and was above the metal gantry. There were not electrical items that the electricians would need to service that high into the roof area and in my judgment, if an electrician did ever feel the need to go that far up into the roof space, it was an extremely rare event. From the evidence I heard there seemed to be no requirement for a maintenance electrician to go up to that height within the block and I do not accept that could be a source of any significant asbestos.

45. Vauxhall also sought to contend that the pipes cascading down from that main pipe were lagged but not with asbestos. I do not accept that contention. Mr Chalmers confirmed in his evidence that there was asbestos used for the purposes of promoting heat conservation in the pipes. However, he said that over a passage of time the asbestos was replaced, by professional contractors, with fibreglass sleeves. The other witnesses were inconsistent with their descriptions of the lagging on the pipework that cascaded to the machines requiring hot water. Mr Chalmers raised in re-examination by Vauxhall's counsel that there had been a re-arrangement of DE and DA block in the period 1970 to 1972, which he said was a planned project over a period of 18 months. Mr Chalmers contended that at that time the asbestos was removed and replaced with fibreglass on the lower stretches of the pipework. This was an important part of his evidence but it was not set out in his witness statement, which I would have expected, and seems to contradict what he otherwise sets out in his statement that asbestos was being removed over time by specialist contractors. Without any documentary evidence to support what was referred to by him as a "planned project" over 18 months, I am not willing to find that there was such a full-scale switch between DA and DE blocks which resulted in the removal of asbestos lagging on the lower pipes. Other witnesses, including Mr Williams who was called on behalf of Vauxhall, were only able to say that all the pipework was lagged, some in different material to other pipework. The various witnesses were unable to say what the insulating material was made from and I am satisfied that asbestos was still present as lagging on the hot water pipework in the Dunstable plant in the period 1976 to 1979. That pipework was well within the normal working environment of the maintenance electrician.
46. Vauxhall contends that Kitsons were employed as specialist contractors to remove asbestos from the Dunstable plant. Mr Chalmers provided evidence that the work was carried out in a controlled fashion within a sealed chamber, with protective sheeting being used to isolate the area within which the work was carried out with no one other than the specialist contractors being allowed access into that sealed chamber. Mr White also recalled that Kitsons were routinely engaged to carry out work involving the removal of asbestos lagging. Mr Chalmers believed he had called out Kitsons in the early 1970s, but the documentary evidence does not support that recollection. Mr Carey said that he had no recollection of Kitsons, or any other specialist contractor, removing asbestos from the Dunstable plant whilst he was working at Vauxhalls during the late 1970s.
47. Both Mr Chalmers and Mr White were working at the Dunstable plant through to the 1980s and it is a real possibility that Mr Chalmers was in error as to when Kitsons were working in the Dunstable plant. In the circumstances of this conflict between the evidence on behalf of Vauxhalls and that of the Claimant and his witnesses, it is necessary to consider all the documentary evidence in detail and I have taken time to consider all papers included in the trial bundle that have been put before me in

addition to those that have directly referred to me in order to find evidence to support when Kitsons were on site removing asbestos. While I accept the contention made by Vauxhall's counsel that the documentary evidence is not everything and does not provide a complete picture, it cannot be ignored. It provides some contemporaneous evidence of what was happening approximately 40 years ago when, given the passage of time, it is understandable that memories will fade and become confused as to precisely what happened when. Further, there has been no witness evidence from Kitsons, or any of their operatives at the time, which indicates when work was undertaken at the Dunstable plant for the removal of asbestos.

48. There is a great deal of documentation in the trial bundles which deals with the Luton site and how asbestos was dealt with there. The documentation also contains a number of minutes from the Dunstable Environment Committee. What is notable is the lack of documentary evidence of any work removing asbestos from Dunstable until the 1980s – that is, after the relevant period.
49. The minutes of the Dunstable Environment Committee meeting on 11 September 1980 sets out that samples of insulation board had been taken to be checked for asbestos content; it also sets out that blue asbestos insulation was on the old steam cleaner and that Kitsons were removing it. These minutes indicate that Kitsons were working at the Dunstable plant in 1980, identifying and removing asbestos, after the time Mr Carey was working at the Dunstable plant. A note dated 13 April 1981 sets out that there would be a removal of fire screens on the ground floor of the Dunstable plant during the first two weeks of the 1981 Annual Closure (end of July/early August). 1300 linear feet of the fire screens were to be removed and disposed of by a company called Cape Contracts Ltd. The note recognises that the fire screens contain crocidolite asbestos and were to be removed in accordance with the 1969 asbestos regulations.
50. On 16 September 1982, a memorandum referred to the asbestos ceiling tiles in the DE Block. Concern was expressed by the maintenance personnel at that time with regard to the potential health hazard associated with the removal of the tiles in order to install improved lighting and that the dust lying on top of the tiles contains asbestos fibres. The samples were examined and it was found that the dust lying on the top of the tiles consisted of general dust and dirt and glass fibres with “a few fibres which look like asbestos”.
51. On 6 January 1984 Michael Bell, the industrial hygienist, put together a note with respect to asbestos stripping. He referred to the objective as being “To achieve a satisfactory level of asbestos control [something is then blanked out] in asbestos stripping operations without using up excessive safety and hygiene effort which would be better spent elsewhere”. The note then proceeds to set out that jobs will be divided into those jobs where experience indicates that well-known procedures will result in low or zero exposure to the surrounding areas and few problems for clean-up which jobs would be monitored on trust with spot checks, and those jobs where there is either no experience or experience indicates that there will be a problem. Mr Bell's note continues “Personnel Kitsons have worked for us now for many years. Their strippers are always the same people, so continuity can be maintained – they know what is and what is not acceptable.” In what are described as “sample” memos dated March and July 1983 reference is made to the removal of asbestos and crocidolite (blue asbestos). These are clear evidence that asbestos removal was still taking

place in the 1980s, and that Vauxhall were aware that there was still asbestos requiring removal, after the end of employment of Mr Carey.

52. In a memorandum dated 12 March 1984 from a Mr GA Wills to Mr D Donkin, the following passage appears: “It must be mentioned that during the past 3 months problems have been experienced with Kitsons Limited on the specific operation of asbestos removal. Trade Union Officials, BCV/VM Management and this Factory Inspectorate have had cause to investigate the unsafe site working and disposal procedures.” This document clearly shows that asbestos removal was still taking place in 1984.
53. In a further note from Mr Bell to Mr J Hurst dated 25 July 1984 it appears that another contractor, Assiscrest, had been employed and that there were concerns about the manner in which the work was being carried out, for example “I saw a tent that Assiscrest had built – it was terrible compared to Kitsons tents...” In the final paragraph of that July 1984 note, Mr Bell said this “Kitsons 5 years ago made some of these mistakes, but never so bad as this, and all in one tent, and we can now rely on them to get it very nearly 100% right.” This note suggests that Kitsons had been instructed from 1979 to remove asbestos.
54. This documentary evidence, when viewed together, indicates that there was considerable asbestos removal taking place in the early 1980s. This provides further support for there being asbestos in the factory and shows that the asbestos in the factory was still creating an issue years after Mr Carey had left his employment with Vauxhalls.
55. I have concluded that Mr Chalmers must have been mistaken with respect to when Kitsons were working at the Dunstable plant and that it was not in the early 1970s as he suggested – there would have been no need for Kitsons to be employed in the early 1980s if the asbestos removal had already taken place.
56. It further appears from the documentation in the trial bundle that a clear asbestos warning label with the following wording “*a Take care with asbestos Warning Breathing asbestos dust can damage health Observe the safety rules*” was introduced in 3 March 1984. The note with the label states – “*The materials have not changed but the introduction of the label is a new departure.*” Again, this is indication that steps to warn workers about the dangers of asbestos were still being increased as late as March 1984. A further note, dated 8 March 1984, says the following: “Spoke with Frank Wyles. He to check the components – is the asbestos exposed, how are the components handled – is there in fact dust/pieces of asbestos containing material in the stillages ...”
57. In another document, referred to by Vauxhall’s counsel in the submissions I accepted after the hearing, the undated “Operating Procedure for Work on or in the Vicinity of Existing Insulating Materials” records in paragraph 1: “*The quantities of insulating materials which may contain Asbestos is very limited at Ellesmere Port and Dunstable, at Luton it is confined to older installations.*” Counsel for Vauxhall submitted that this document was likely to be from 1983 by virtue of the surrounding documentation. That would not be consistent with the other documents showing that asbestos removal was taking place in 1984 and, in my judgment, the surrounding documentation (insofar as that assists with dating this document) indicates that it was

a document created in 1989. That date would not be inconsistent with the other documentation available. I consider it likely that by 1989 the quantity of insulating material containing asbestos was very limited by 1989, but the relevant period for this case is 1976 to 1979.

58. In addition to the positive documentary evidence that steps were being taken in the early 1980s to remove asbestos and give warnings about its presence at Dunstable at that time, is the fact that there is a lack of any documentary evidence to establish that Kitsons (or others) were at the Dunstable plant in the 1970s removing asbestos in a controlled manner as has been averred to by Mr Chalmers, or that there was a 18-month planned project swapping DA and DE block with the attendant changes to the lagging on the pipework. While I accept that there were changes to the lagging on the pipework at some point, it is apparent that there has been an error in Mr Chalmer's recollection of when that was taking place.
59. Mr Chalmers accepted in his evidence that electricians could come into contact with asbestos but not as a specific requirement of their role at the Dunstable plant. In my judgment, at the time Mr Carey was working at Dunstable there was still asbestos used to lag the hot water pipes – not merely the large high pressure hot water pipe but also those that cascaded down – and that their work in and around the machines to keep production going would inevitably result in them being in close vicinity of that lagging and rubbing up against those pipes. A number of the witnesses referred to dust on their clothes or overalls. Mr Williams accepted that he could get dust on his shoulder from rubbing against the insulated pipes, but assumed it was just “factory dust”, although he could not say what was contained within that “factory dust”. Mr Hodge also referred to brushing past pipes and getting a white stripe on his clothes. It is a common sense conclusion that where those pipes were lagged with asbestos the dust that rubbed off onto overalls, clothing, skin or hair would contain asbestos fibres. Mr Carey said that he would sometimes have to walk through, kneel in or lie in dust in order to carry out his work. While I do not consider that would have been large quantities of dust (not the “clouds of dust” referred to by Mr Carey) particularly as there was a dedicated cleaning division and the factory was being regularly cleaned, I do consider it a realistic description of the working factory environment that there would have been dust around the plant and that Mr Carey would have been exposed to that dust. This was significant, not de minimis exposure, and was something that Vauxhall could reasonably and practically have avoided by removing all the asbestos from the pipework before 1976.
60. It is clear from the documentation that Vauxhall were aware of the hazards of asbestos and the duty to prevent exposure. A memorandum from Mr Thompson dated 28 October 1969 referred to a draft specification and procedure to be included in the VM Standard Specifications for Heating and Ventilating Services. A draft revision refers to the ban on the use of asbestos lagging and how personnel were to deal with any disturbance of asbestos materials and the use of respirators, suitable protective clothing, wetting of lagging and using a vacuum cleaner. It states “...*Under no circumstances will ASBESTOS lagging be indiscriminately knocked or stripped from pipework in situ nor anywhere inside VM Ltd.*”
61. Mr Carey said that, while he would neither remove nor reapply asbestos himself, he was working alongside welders and pipefitters and that he recalls seeing maintenance fitters, who he would sometimes work alongside, both remove asbestos lagging and

then replace it over the pipework by mixing up a white powdery substance. It was Vauxhall's case that Mr Carey and the other maintenance electricians in division 895 would not work alongside other trades or maintenance work. I do not accept that to have been the case. While the Vauxhall plant in Dunstable may have been heavily unionised in the late 1970s, that did not go so far as meaning that trades could not work alongside one another and Mr Chalmers accepted that electricians and maintenance fitters would work closely together in the same maintenance crib. As a consequence, if a maintenance fitter was working with something insulated with asbestos then, if Mr Carey was working alongside that maintenance fitter, then he too could be exposed to asbestos. However, particularly when considering the memorandum dated 28 October 1969 referred to above, I do not consider it likely that a fitter would be replacing asbestos with newly made up asbestos in the late 1970s. This was not something that was recalled by witnesses other than Mr Carey and, in light of the level of knowledge of the dangers of asbestos by that time, I do not consider that Vauxhalls would have been instructing its fitters to make up new asbestos where it came off. An adequate explanation was given for what Mr Carey might have seen and believed to be the mixing up of asbestos, namely that it was in fact the mixing of paint.

62. As well as the exposure to asbestos from the insulated pipework feeding the machinery that required hot water, which I find to have still been insulated with asbestos in the period 1976 to 1979, I find that there were other potential sources of asbestos fibres which liable to have been transferred back home on Mr Carey's overalls, work clothes, hair or skin. These include the ceiling tiles which created the roof void above the offices. The amount of asbestos that might have been dislodged might not have been great but a small number of asbestos fibres had been positively identified in the dust and dirt that collected on top of the tiles and every time a maintenance electrician was going up into the roof void and putting his head above those roof tiles in order to see where the cables or lights were that he needed to fix, he was potentially breathing in those fibres and/or picking them up on his clothes, hair and skin. This cannot be described as de minimis exposure. Vauxhall's obligation was to reduce exposure to asbestos dust to the minimum that was reasonably practicable. It would have been possible for that dust and dirt to have been removed by safe cleaning and it would have been possible, before those tiles were removed, for those who had to disturb the tiles to be told to wear masks and to cover their hair. They were not instructed to do so nor were they told that they must not disturb the dirt and dust on the surface of those ceiling tiles. The documentary evidence available supports a finding that the potential exposure to asbestos, created by going into the roof void above those ceiling tiles in order to fix lighting and to deal with any other electrical wiring in that roof void, was not apparent until after the late 1970s.
63. In addition, there was asbestos in the electrical substations located on the roof and, while it was for supervisors with special authority to work with high voltage elements to isolate those substations, the maintenance electricians would go into the substations in order to switch capacitors in and out which involved contact with asbestos cladding. Similarly, the calorifiers in the plant room were clad with asbestos and it was for the maintenance electricians to remove and replace the probes for those calorifiers. Although it was not something that was undertaken very often, it was again a potential source of asbestos exposure.

64. Asbestos dust was also created from the drilling of the brake shoes. The dust from those machines was normally controlled by ventilation and extractors. However, it was part of the responsibility of the maintenance electricians, such as Mr Carey, to service these machines and there would be a build-up of some dust where the pads were drilled. Further, Mr Hodge recalled occasions when the ventilators and extractors were not working so that there was dust around the machines which would transfer onto his hands and clothing. Again, while this might not have happened very frequently, it was a clear source of asbestos dust which could not be described as de minimis. While the use of ventilators and extractors was a reasonably practical step to limit the asbestos dust, when those ventilators and extractors were not working the asbestos dust was a source of significant exposure.
65. Finally, I have seen evidence that there was approximately 1300 feet of asbestos fire panels in the factory. These were not removed until 1981 when Cape Contractors were instructed to carry out the controlled removal of the panels containing crocidolite (blue asbestos). Those panels were therefore present in the factory at the relevant time that Mr Carey was working for Vauxhall, however I am not satisfied that they created any more than a de minimis risk of exposure to asbestos dust. They were not panels that the electricians were working with and, unlike the pipework and the ceiling tiles, I am not satisfied that there is evidence to support Mr Carey having direct exposure to those fire panels through his work.
66. Mr Chalmers gave evidence that division 893, for which he was also responsible when he was in charge of building maintenance, had the job of for keeping the plant clean and in good order. He gave evidence that the cleaners assigned to division 893 were required to clean up debris left not just by the production operatives but also the maintenance engineers. That does not, however, detract from the evidence of Mr Carey – supported by his own two witnesses but also the evidence of Mr Williams – that as a matter of pride, and simple expediency and efficiency, that he would clear up after his work where he had made a mess. If it was a big job that required the cleaners then he would call them in, but that was not always the case. It had been taught to them as apprentices that they should clear up after themselves and that is what they continued to do when they were trained electricians. In clearing up after himself when he had carried out any work, any asbestos fibres within the debris on the floor would be picked up again thereby increasing the risk of exposure. While the description “clouds of dust flying up” might be an exaggeration, this was a working factory and inevitably there would be dust and debris created when work was being carried out.
67. Mr Carey’s role as an electrician was to ensure that the production line was continuing to work efficiently, however Mr Carey would also work overtime in the evenings and at weekends and during the summer shutdown when he could. While Mr Carey thought he had worked more than one summer shutdown, the evidence of a number of witnesses was that an apprentice was not permitted to work during the three-week summer shutdown. As he qualified after the shutdown in 1977 and left in 1979, at the very least he worked during the 1978 shutdown, at the end of July and beginning of August. It was during the annual three-week shut-down that the bigger jobs were undertaken and Mr Carey said that, particularly during the shutdown, it was necessary for everyone to “muck in” to get the jobs done as it was an opportunity to get everything fixed, including the larger scale work, while production was stopped

for a short period. Again, it is a commonsense conclusion that during this time the exposure to asbestos could be greater as everyone would be working together in all different parts of the Dunstable factory.

Conclusion

68. On the evidence I have heard I am satisfied that the maintenance electricians, such as Mr Carey, were exposed to significant quantities of asbestos dust which was picked up on clothing, skin and hair and transferred back home – both with personal contact with members of the family, in this case Mrs Carey, or through an individual carrying out laundering of those clothes, again in this case Mrs Carey. There was, by reason of this exposure, a material increase in risk. The lagged pipework, the calorifiers, the substations, the ceiling tiles and the brake pads were all sources of asbestos exposure. This was more than mere negligible or de minimis exposure but amounted to a material increase in risk. Even Mr Chalmers said about the maintenance electricians “I would accept that they could come into contact with asbestos but they would not come into contact with asbestos as a specific requirement of their job”.
69. Mr Carey said that he would often be working alongside plumbers and heating engineers and “both we and they were covered in dust each and every day”. While the description of being “covered” in dust might be an exaggeration, I am satisfied that there was dust in the factory and that during the period 1976 to 1979 that included asbestos fibres that would be picked up onto clothes, hair and skin and transferred home where there would be further transfer of the dust and fibres through the laundering of clothes and normal personal contact.
70. I am satisfied, on this preliminary issue, that liability has been made out.