
EXPOSURE TO ASBESTOS IN SCHOOLS: A BREACH OF STRICT LIABILITY

STATUTORY DUTY

MICHAEL RAWLINSON QC

Abstract

Where material exposure to asbestos can, on balance, be demonstrated to have occurred in respect of either a pupil or an employee within the school environment, from 1902 to 2012, the liability for the same is strict where the school was either maintained by a Local Education Authority or was in receipt of a grant direct from the Secretary of State. This is laid out in a series of statutory instruments (and associated Judicial dicta) which have clearly been long forgotten but which I stumbled upon recently. Further, when properly understood, the scope of the common law duties on a school in respect of its duties to those so exposed is almost uniquely high. I seek to approach this topic by providing background to low exposure claims in asbestos generally, moving to exposure in schools, then dealing with the statutory duties and finally concluding with a review of the width of the common law duty of school occupiers. I have also provided a 'ready reckoner' setting out year-by-year and by school type which regulatory regime applied. (I would like to thank both Jane Riley of The Manchester Incorporated Law Library Society, Booth St, Manchester for her invaluable help in locating some of the more obscure Regulations referred to in the table accompanying this paper. All errors are mine alone)

A: Introduction

A1. As I have set out in the past, but which bears repetition, four specific, tactical challenges arise from low asbestos dose mesothelioma cases:

- (a) The lower the original dose, the harder it will often be for the victim to recall the circumstances when asked – especially in the very early days during and after diagnosis, when the victim often (and rightly) is more concerned by the abrupt prospect of an

early and painful death rather than the mundane detail of his/her working and scholastic life experienceⁱⁱ.

- (b) The lower the original dose, the harder it will be to prove that it occurred in fact. This is a subtler point than it at first appears. I do not mean by this that a defendant will necessarily maintain a positive denial of exposure (ie ‘you can’t have been exposed in X circumstances because we can show that no asbestos was present there’), but rather the allegation of exposure-in-fact can, in low doses, collapse into the assertion that there was an *opportunity for* exposure rather than proof that exposure occurred in fact. A good example is the pipe in a room which has asbestos lagging on it. Just proving that the victim was in the same room may, depending on the precise circumstances, do no more than prove the *opportunity for exposure*. The lawyers must always go further than that and prove the inference of exposure. How that is done lies beyond the scope of this blog because it is so fact specific that resolution of this issue forms the meat of daily practice.
- (c) The lower the original dose, the more the defendants can be tempted into legal heterodoxy by seeking to argue that such a dose cannot be distinguished from ‘background’ risk and hence cannot have constituted a material contribution to a subsequent mesothelioma. This argument, wholly fallacious as it is, also lies outside the scope of this blog, not least because it was the subject of my last paper.
- (d) The lower the original dose, the harder it will be to prove that it constituted either a foreseeable risk (pre 1965) or a breach of statutory duty. This issue *is* the subject of this blog.

A2. School exposure cases exemplify each of the above problems to the greatest degree. To add to the difficulties can be the fact that victims are sometimes very young. One of my clients in this position is 31 years old. This demonstrates not just that this horrible

condition can, on occasion, strike the young but also that school exposure to asbestos (which then becomes a prime suspect) can have occurred until at least a decade ago.

A3. It is important to bear in mind that ‘school cases’ can involve two classes of victim, namely the workers (teaching staff/caretakers & ancillary staff/contractors working on site) *and* the children being taught (literally) intramurally. The two classes of victim have been hitherto understood to have been owed differing statutory duties. One of the purposes of this paper is to show that the Regulations I have rediscovered expressly draw no distinction between pupils and employees.

A4. Where then do we find asbestos in schools?

(a) The implied, but by no means sole, focus of this blog is the ‘system built’ schools which had asbestos incorporated into their structure by design and in order (usually) to reduce costs. The history of these schools is interesting because the timing of their creation is *after* the coming into force of the 1945 *“Primary and Secondary Schools (Grant Conditions) Regulations 1945 (S.R. & O. 1945 No. 636)*. So, in future, it may become an automatic reaction that if one has a ‘system built’ school one immediately considers the Regulations.

(b) In 1957 a number of local authorities, led by Hertfordshire County Council set up a consortium to agree and supply schools of a modular form based around a steel structure which would be quicker and cheaper to build than brick alternatives. Anecdotally, they were particularly popular in the mining areas of the Midlands so that if one part of the school collapsed owing to mining subsidence, other parts would be left standing and only the affected part required replacement. The consortium was initially known by the acronym CLASP (Consortium of Local Authorities Special Programme). Over time this changed to SCOLA and eventually to Scape. Again, to emphasise, Scape (which is jointly owned by a number of City and County Councils) is both the designer and, if needed, the builder of the project.

- (c) Within such schools, asbestos could be found as infill panelling between the load bearing steel stanchions, around the core of the steel columns themselves (which would be amosite) and as set out below within the HSE document “*Asbestos in system buildings Control of Asbestos Regulations 2006 Guidance for duty holders Updated 18 September 2008*”

9. ACMs may also have been used in these buildings as unrecorded substitute items where there were material shortages and/or poor supervision. In addition excess or waste ACMs may have been left hidden inside columns or panels and ceiling voids. Consequently, asbestos may be found in some unexpected locations and the presumption should be that ACMs would be present in other concealed areas.

10. There is potential for asbestos fibre release from damaged column casings in system buildings. Gaps in the column casings can occur as a result of previous alteration, removal or direct physical impact on the casing as highlighted by the incident in the CLASP school referred to in paragraph 1. In light of this incident, HSE asked the duty holders for schools to take immediate action to identify and seal any gaps in damaged column casings. School buildings were considered to be a priority due to the nature of the school environment, the age of the occupants potentially exposed and because schools make up the largest stock of system buildings.

In truth, asbestos can be found almost anywhere within an affected school. The Education & Skills Funding Agency document “*Asbestos in schools: Where it may be located*” (Feb 2017) states:

“AIB was extensively used in the construction and refurbishment of schools – often to provide fire containment. It was used in wall panels, ceiling tiles and door surrounds and as a general building material. Corridors were often lined with it, but it was also extensively used in rooms including classrooms, halls, science laboratories, kitchens and toilets. AIB is sometimes hidden, for instance when used as a firebreak in ceiling voids, or in composite materials sandwiched between materials such as strawboard, plywood, metal mesh, sheet metal and plasterboard. AIB panels were frequently cut to shape during construction so it is common to find off cuts in ceiling and wall voids. External soffits can also be made of AIB” (Emphasis added – i.e. it can appear in schools of some vintage which underwent refurbishment)

- (d) Further, experience shows that in fact, asbestos can be found in the following situations

- Panelling – especially under radiators
- Within electric storage heaters (particularly those with blowers)
- Sitting on the exterior surface of music room ceilings and walls
- Stored materials in open areas (*Willmore v Knowsley BC*)
- From damage to ceilings containing asbestos tiles (which will be AIB)
- Floor tiles
- Cement roofing and guttering
- Textured coatings
- (Occasionally) lagging on pipes

(e) So, how big a problem is this? Overall the HSE tells us that there are more than 1400 CLASP sites (and a small number of other public buildings such as fire stations, police stations and MOD sites). Sites built in the period 1945 (i.e. pre-CLASP but using similar methods up until the early 1980s will probably have asbestos surrounded pillars. The word ‘probably’ here is important. At §2, the HSE are quite explicit: when considering CLASP buildings within this period

“There is a likelihood that such buildings contain asbestos materials”

B: The newly re-discovered statutory duties

B1. The overall conclusion that the liability for exposure to asbestos in non-independent schools is strict, is based on the language used in some venerable primary and secondary legislation together with relevant Judicial gloss. As ever, historical context gives important insight.

B2. The starting points for this analysis are the Elementary Education Act 1870 and the Education Act 1902 (the latter being popularly known as the ‘Balfour Act’). The 1870 Act was the first national Act dealing with the provision of education. The intention of the sponsors of the Bill was to create a universal, compulsory and non-denominational system. The Act did not achieve all that but it did create ‘school boards’ which had the power and duty of providing school accommodation within their districts. Schools within their areas were conducted under the control and management of the individual school boards, which acted with a high level of autonomy from central government. However with those powers came responsibility albeit one which was, at first sight, expressed opaquely. Section 18 of the 1870 Act stated:

“18. The school board shall maintain and keep efficient every school provided by such board...”

Allied to the duty under s18, came the further responsibility under s30 that school boards were to be made bodies corporate which could be sued and held liable in damages. Thus whatever the duty under s18 meant, a breach of it might well render the school board liable in damages. We shall return to its meaning in a short while.

B3. By degrees over the next 30 years, education became compulsory for an ever-broader age range of children and, of equal importance, from 1891 it became largely free to families. There was, however, a remaining anomaly which required addressing and it is important to set it out now because it goes some way to explaining the multiplicity of regulations covering the condition of school premises which you will find set out in the enclosed table.

B4. The anomaly was that the 1870 Act recognised that hitherto, education in England and Wales had proceeded via voluntary and religious organisations. This patchwork quilt of fee paying, philanthropic and church schools of vastly varying quality was permitted to run

alongside the school board-maintained schools. The school boards had a power to provide funding from local rates for such religious and non-conformist schools under the 1870 Act but it was not one which was often applied. So, if from 1891 education was to become free, how then were these non-school board institutions which had hitherto charged, to earn their keep?

B5. One of the tasks of the Balfour Act of 1902 was to address this issue. It replaced school boards with 'Local Education Authorities' ('LEA's). The LEAs were then to provide funding not just to schools which had been run directly by the boards but also to the 14,000 church schools (mainly Anglican and Catholic). This outraged the non-conformist schools which, not thereby being eligible for funding, saw themselves as having been discriminated against. In return for those schools which were funded, uniform standards could be set by the Local Authorities. The 1902 Act had long lasting effects of relevance to our story:

- (a) First, we see for the first time that the quid pro quo for funding of a school by the LEA was that the LEA obtained a large measure of control of that school;
- (b) Second, we see for the first time that how a school is funded becomes relevant under what regime it is to be controlled;
- (c) Third, and of greatest importance to us, was this: where a newly created LEA was funding the school, Section 7 of the 1902 Act repeated the duty contained in s18 of the 1870 Act that the LEA "*shall maintain and keep efficient*" that school. Since, as we have seen, the numbers of schools funded by LEAs was greater than that of the school boards (ie by including Catholic and Anglican church schools), it suddenly became very important to know what this phrase meant in fact. This will be dealt with below, but

whatever it meant, it is necessary first to complete the short historical review of the structure of the principal Acts.

- B6. The Education Act 1902 was repealed by Schedule 7 of the Education Act 1921 but the provisions of s7 of the 1902 Act were effectively re-enacted by Section 17 of the Act 1921 which again laid directly upon (what was now called the Local Education Authority (“LEA”) rather than the ‘school board’) the duty to *‘maintain and keep efficient all public elementary schools within their area’*. The importance of this is that we can begin to see that the phraseology appears as a sustaining thread throughout repealed and replaced legislation. As far as any claims are concerned, this amounts to a seamless formulation of the duty and a consistent meaning to words such as ‘efficient’ up to the next staging post in our story, namely the coming into force of the Education Act 1944.
- B7. The 1944 (“Butler”) Act repealed the 1921 Act by its 9th Schedule. Of greater moment was that the way in which the LEA was fixed with liability for schools changed – albeit the end result remained the same: a liability which was strict. However, in order to understand fully how these changed approaches operated, it is necessary to consider the continuing situation (inherited from the 1902 Act) that not all schools were maintained either by the School Boards (or now the LEAs). The Act therefore recognised 4 categories of School:
- (a) The wholly independent (usually Public) Schools which lay outside all state control.
 - (b) At the other extreme those schools which were maintained by the LEA via a block grant provided by the Secretary of State *“Maintained Schools”*
 - (c) Grammar Schools which were provided for by a grant by the Secretary of State (i.e. without it first being given to the LEA) *“Direct Grant Grammar Schools”*ⁱⁱⁱ
 - (d) Other schools which were non-grammar schools but were also provided for by direct grant (*“Direct Grant non-Grammar Schools”*).

- B8. It will be recalled that under the 1902 and 1921 Acts, a direct duty was created in respect of the school premises. Under the 1944 Act, two different mechanisms were substituted.
- (a) First, pursuant to s10 EA 44 the Secretary of State was under a duty to promulgate Building Regulations for Schools, which then became the separate duty of the LEA to enforce (*‘the building regulations regime’*). Section 10 applied only to *Maintained Schools*^{iv}. After 01.11.96 Section 10 was, by virtue of Schedule 38 of the Education Act 1996, replaced by s542 of that latter Act albeit in very similar terms.^v
- (b) Second, pursuant to s100 EA 44 the Secretary of State could impose conditions, in the form of Regulations, upon which the receipt of public funding was dependent (*‘the funding regulations regime’*). The funding regulations regime applied to *Maintained School and Direct Grant Grammar Schools and Direct Grant non-Grammar Schools*^{vi}
- B9. Since the Regulations upon which I rely were nearly all passed under these two Sections it is necessary to consider their effects in a little more detail before passing onto the Regulations.
- (a) Insofar as s10 refers to the duty to impose ‘standards’ on *maintained schools*, then in the light of the fact that Section 63 of the EA 44 expressly exempted all such schools from any other species of Building Regulation, it is clear that ‘standards’ refer unequivocally to the condition of the building and its internal parts;
- (b) The usual sole method of enforcing an LEA’s duty to ensure compliance with the building regulations promulgated under section 10, was by action undertaken by the Secretary of State (s99 EA 44). However, an exception existed where it was said that a breach of those building regulations passed under s10 had caused personal injury. In such cases it was established that a private right of action lay in the hands of the victim (per Diplock LJ in *Bradbury v Enfield Borough Council* [1967] 1 WLR 1311 @ 1334

“[The LEA].. does fall under the duty imposed by subsection (2) of section 10 – that is to say, of securing that the premises of the school conform to the standards prescribed for schools of the description to which the school belongs. But, as I have already pointed out, in my view a failure to comply with that duty is one of nonfeasance, for which the only remedy is that under section 99 of the [1944] Act: it is enforceable only by the Minister, although a breach of the duty may result, if it causes injury, in an action for damages on the part of the person injured: see Reffell v Surrey County Council” (Emphasis added). I will return to consider the facts of *Reffell* in more detail later.

- (c) When considering to whom duties were owed by the LEA under the 1944 Act, no distinction has ever been drawn between pupils and academic or other employees of the LEA. Indeed, as we shall see from the terms of the Regulations passed under the Sections, their language makes it clear that no such distinction is to be drawn and thus practitioners need to be considering the Regulations in claims for mesothelioma brought by children and staff.
- (d) Any claim for damages based on breach of Regulations which arose from exposure after 2013 (and owing to latency considerations, that situation cannot arise until circa 2023), would not be extinguished by s69 Enterprise and Regulatory Reform Act 2013 since the parent Act for these Regulations is the EA 44 and not the HSWA 74.
- (e) Because the funding regulations regime under s100 EA 44 permits the Secretary of State to provide funding to *maintained schools* and to both types of *Direct Grant schools*, it perhaps should not come as a surprise that separate regulations apply to the differently funded schools. This adds a layer of complexity to which I turn next.

B10. There is appended to this paper a ‘ready reckoner’ in which I set out, year by year from 1945 to 2012, the regulatory regime applicable to each of the funded types of school. The

intention is that a practitioner pleading a claim can identify which years the claim relates to (which will take her down column 1). She must then identify the type of school in which it is claimed the exposure occurred and then she can identify which regulatory regime applied. If the box says 'see above' then she should go back in time to the first named Statutory Instrument she encounters in the same column and this will identify the particular SI and Regulation. There are a number of general observations which need to be made about broad themes which the ready reckoner demonstrates. Once they have been identified, we can then look to see how the wording of the various regulations leads to strict liability (at least until 2012).

- (a) The regulatory position in respect of '*maintained*' schools is not straight forward.
- (i) From 1945 to 1959 and from 1981 onwards there was only one Regulatory regime in force. However, in the period 1959 to 1981, there were two parallel sets of Regulations, divided between the *Standards for School Premises Regulations 1959* and *The Schools Regulations 1959*. They are in fact largely complimentary since the '*Standards*' regulation provided that the design, construction and use of materials within would provide that the 'health and safety of the occupants shall be reasonably assured'. This was effectively a requirement relating to risks arising from latent design. On the other hand "*The Schools Regulations*' provided that the premises should be kept in a '*proper state of repair and ...hygiene*' i.e. this was a repairing requirement. This 'repairing requirement' was expanded in 1959 to include the requirement to ensure that '*adequate arrangements shall be made for the health and safety of the pupils and staff*'.
 - (ii) It is conceded that for *maintained* schools the standard to be achieved after 2012 was limited to that of ensuring certain levels of protection '*so far as is reasonably practicable*'. Prior to that, it had been strict.

- (b) In respect of the Direct Grant schools, the following broad themes arise:
- (i) They did not exist as a genus of school until the 1944 Act;
 - (ii) To reiterate, the control exercised in respect of them was not of the 'building regulation' type under s10 EA 44 but rather was in terms of conditions attached to their funding.
 - (iii) The first Regulations setting out those conditions were contained in the Primary and Secondary Schools (Grant Conditions) Regulations 1945 and Schools Grant Regulations 1951. These two Regulations also contained the funding conditions applicable to LEA *maintained schools* (i.e. the LEA *maintained schools* were doubly controlled by s10 and s100). However, after the coming into force of the Direct Grant Schools Regulations 1959, the *Direct Grant schools* (of both types) were regulated separately from the *LEA maintained schools* under s100.
 - (iv) From 1975 the Wilson government, as part of its implementation of its policy of promoting comprehensive education at the expense of the *Direct Grant Grammar Schools*, announced that direct grant funding for such schools would be quickly phased out and that such schools should make their election: either to become wholly independent (and hence fall outwith the regulatory system then in place) or to become *LEA maintained* and hence to fall *into* the regulatory regime applicable to 'ordinary' *LEA maintained* schools. It is for this reason that I strongly suspect that after (say) 1980 it is unlikely that practitioners will encounter an exposure history for a school where the Direct Grant Schools Regulations 1959 still apply.
 - (v) I cannot find any regulation of wholly independent schools until 2003^{vii} but I omit reference to them since I do not believe such claims will be encountered in practice and I do not wish to complicate further an already complex analysis.

For the same reason I omit reference to Grant Maintained Schools (in existence between 1988 and 1998).

B11. Overall, where they apply, the Regulations impose continuous statutory coverage from 1945 to 2012. Although the duties are variously expressed, there are a number of key phrases which are encountered repeatedly, and it is those upon which we now have to concentrate:

(a) *“The school shall be kept on a satisfactory level of efficiency”*

Relevant to the following

LEA maintained schools	Direct Grant (Grammar)	Direct Grant (Non-Grammar)
29.05.45 – 30.03.59	29.05.45 – such time as Direct Grant status was lost after 1975	29.05.45 – such time as Direct Grant status was lost after 1975

This is analysed below as the *‘kept in efficiency’* requirement

(b) *“The premises shall be kept in a proper state of repair”* (and after 1951, in a proper state of *‘hygiene’*)

LEA maintained schools	Direct Grant (Grammar)	Direct Grant (Non-Grammar)
29.05.45 – 30.08.81 <i>‘repair’</i> 15.10.51 – 30.08.91 <i>‘repair’ & ‘hygiene’</i>	From 29.05.45 <i>‘repair’</i> – and from 06.11.59 for <i>‘repair’</i> and <i>‘hygiene’</i> : both then operative until such time as any individual	From 29.05.45 <i>‘repair’</i> – and from 06.11.59 for <i>‘repair’</i> and <i>‘hygiene’</i> : both then operative until such time as any individual

	school lost Direct Grant status after 1975	school lost Direct Grant status after 1975
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This is analysed below as the *'kept in repair/hygiene'* requirement.

- (c) The buildings of the school, its design, construction and *'the properties of the materials used'* (this latter requirement was included up to 30.08.91) are such that the *'health and safety of the occupants...shall be reasonably assured'*

LEA maintained schools	Direct Grant (Grammar)	Direct Grant (Non-Grammar)
27.05.59 – 30.07.81 (including <i>'the materials used'</i>)	N/A	N/A
01.08.81 – 30.10.12 (without reference to <i>'the materials used'</i>)		

This is analysed below as the *'reasonably assured health and safety'* requirement.

- (d) *"...adequate arrangements shall be made for the health and safety of the pupils and staff"*

LEA maintained schools	Direct Grant (Grammar)	Direct Grant (Non-Grammar)
09.01.65 – 31.08.81	09.01.65 - until such time as any individual school lost Direct Grant status after 1975	09.01.65 - until such time as any individual school lost Direct Grant status after 1975

C: Analysis of the key statutory phrases

The 'kept in efficiency' requirement

- C1. It will be recalled that this wording stretches back to the 1902 Act and as the duty upon the LEA to fund schools was applied to an ever-widening category, the meaning of the phrase became ever more important. It should not surprise us therefore that there is a long history of judicial construction of the phrase.
- C2. It commences with a pair of separate but chronologically intertwined personal injury actions brought by pupils arising out of accidents at school in 1908. The cases were *Ching v Surrey County Council* [1910] 1 KB 786 and *Morris v Carnarvon County Council* [1910] 1 KB 840. Both cases were decided by the Court of Appeal. In *Ching*, the infant Plaintiff had suffered an orthopaedic injury when running through a shed situated in the playground of his school in which there was a pothole, into which he fell. In *Morris* the infant Plaintiff had been injured when her fingers became trapped in a door operated by an excessively powerful spring. There are several points to note about these cases at the outset:
- (a) These cases proceeded under the provisions of the Balfour Act of 1902. The relevant wording was the duty placed upon the School Board which '*shall maintain and keep efficient*' its schools.
 - (b) *Ching* was clearly a case in which part of the school was in positive disrepair (i.e. the pothole); *Morris* involved a situation in which the door was not in a state of disrepair – it worked according to its design: the complaint was that the design created a danger of injury.
 - (c) There was no reason to believe that the pothole in *Ching* (causing injury in 1908) predated the coming into existence of the School Board (i.e. in 1902) whereas in *Morris* it was accepted that the dangerous door had been installed whilst the school was under the control of an authority which the School Board had then subsequently taken over.

C3. Whilst in both *Ching* and in *Morris* the focus of the debate was the word ‘maintain’ rather than ‘efficient’, the cases are important to our analytical story since (a) the words appear closely allied within the same duty under s7 of the 1902 Act, and (b) there were several points run by the School Boards in respect of ‘maintain’ which, had they succeeded, would have prevented any operation of the word ‘efficient’ – whatever that latter’s meaning was subsequently taken to be. Thus it becomes important to know that in both cases, the School Boards argued that the word ‘*maintain*’ could not relate to keeping the fabric of the school in repair but only to the running of the school in the very widest and vaguest sense. In both cases the Court of Appeal rejected that argument:

(a) Per Earl of Halsbury (*Ching*) @ 742 – i.e. the case of actual disrepair)

“In my opinion, the words ‘maintain and keep efficient’ as applied to a school, must necessarily include, not only what has been described as the ‘scholastic system’ which is to be enforced, but also the place where the duty is to be performed...”

(b) In *Morris* – i.e. the case of latent danger arising out of the condition of a door, which was not in disrepair per Farwell LJ @ 844

“The case of Ching...has settled...that the duty to maintain the school imposed upon the local education authority by the Education Act 1902 is not confined to the maintenance of the school as an educational institution but extends to keeping the school and the premises belonging thereto in a proper condition....Having regard to the evidence as to the weight of the door, and the strength of the spring, it was a door which it was competent for the jury to find to be a dangerous one for use by young children....It is beside the mark to say that the defendants kept the school as they found it when they took it over from the school board. It was their business to provide and maintain proper school premises which would not be dangerous to the children who were to be educated in them” (Emphasis added)

C4. Pausing there, the effect of all of this in combination is:

- (a) There was a statutory duty placed upon school boards, breach of which sounded in damages for personal injury.
- (b) The statutory duty was not expressly limited by any requirement of ‘reasonable foreseeability’ or of ‘reasonableness, ‘reasonable practicability’ or even ‘practicability’. In that basic sense, it was clearly a strict duty namely to ‘*maintain and keep efficient*’.
- (c) That duty was triggered by both patent disrepair and latent danger arising out of the condition of the premises;
- (d) That duty was accepted by the School Boards when it took over a pre-existing school.

C5. The next judicial development was the case of *Lyes v County Council of the Administrative County of Middlesex* 61 LGR 443, *Guardian Law Reports* October 12, 1962, in which Edmund Davies J considered a claim for personal injury brought by a school boy who, through the horseplay of another, put his hand out to steady himself against the window panel of door which had glass of only 1/8” thickness and thereby smashed lacerating his wrist. The claim relied, inter alia, upon the Schools Grants Regulations 1951 (SI 1951/1743) which, it will be seen from my accompanying ready reckoner table, was passed under the EA 44 and which required by Regulation 5 that the school was ‘*on a satisfactory level of efficiency*’ and by Regulation 6 further required that the school was ‘*kept in a proper state of repair*’

- (a) During the case, Counsel for the Plaintiff conceded that the glass was not in disrepair. He was right to do so: in respect of the statutory duty, this was a case on ‘*efficiency*’ or it was nothing.
- (b) Counsel for the Plaintiff, who clearly vacillated during the trial and submissions, finally conceded in closing that in order to prove a breach of Regulation 5, it was necessary for him to prove that the LEA had been negligent in allowing it to fall into a state of inefficiency i.e. that the state had to give rise to a foreseeable risk of injury. In this,

with respect, Counsel was wrong. The concession drained Regulation 5 of content and thereby added nothing to the common law. This point was immediately seized by the LEA's counsel Patrick O'Connor QC (subsequently to become O'Connor LJ). In the light of the concession, what the trial judge Edmund Davies J (also subsequently destined for the Court of Appeal) said about matters is strictly obiter. However, it would appear that he rejected the concession since he did not accede to Mr O'Connor's consequential submission and held that whether or not negligence was required, the breach of the Regulation was proven and the Claimant succeeded on both bases (which in the light of the Plaintiff's concession) he did not need to distinguish between. That decision is the last I can find which considers 'efficiency' under this Regulation. Might it be argued therefore that, having ended on this uncertain note, there is doubt as to whether Regulation 5 was strict or not? In my opinion the answer to that is 'no'. However in order to reach that conclusion we must first consider subsequent decisions which were considering not this wording but rather the 'reasonably assured health and safety' requirement. I will turn to this next and, once completed, return again to consider the issue of strict liability arising from the 'efficiency' requirement.

The 'reasonably assured health and safety' requirement

C6. It will be recalled from the ready-reckoner and the tables above, that this requirement is found in Reg 51 of the Standards for School Premises Regulations 1959 (SI 1959/890) (Reg 51) and relates to LEA *maintained schools*. At first blush, it looks as if the requirement to ensure that "*In all parts of the buildings of every school...the design, construction...and the properties of the materials shall be such that the health and safety of the occupants ...shall be reasonably assured*" appears to be a weaker one than to 'keep efficient' because of the use of the word 'reasonably'. 'Assured' itself, outwith the terms of a policy of insurance, is an ordinary English word and not a term of legal art. However, where it is encountered in legal context,

it is used to emphasise the existence of a state of affairs which induces a person to feel certain and sure. For example, in an instrument appointing a deputy, the phrase that the appointee “*will, I am assured*’ do X, ‘*assured*’ there simply held to mean ‘*I feel certain he will do it*’ (*Re Cromsbay 43 Ch D 615*)^{viii}. But in respect of the word ‘reasonably’ there are two logical possibilities: either that the ‘reasonable’ refers to the *extent of the steps* which the school needs to take in seeking to provide an objective state of assurance, or that ‘reasonable’ sets an objective cap on the level of assurance to be achieved but which, once determined, must be achieved by the school come ‘hell or highwater’.

- C7. The cases of *Reffell v Surrey County Council* [1964] 1 WLR 358 (referred to above) and *Ward v Hertfordshire County Council* [1969] 2 ALL ER 807, between them, show that ‘reasonably’ sets the level of assurance to be achieved and not the steps to be taken; hence that the standard is objective and strictly to be achieved.
- C8. *Reffell* involved another pupil lacerating her wrist on the 1/8th inch pane of glass inset into an internal school door when she had pushed against it. There had been no similar accident in the girls’ division of the school before albeit there had been one in 1937 (23 years prior to the index accident) in the boys’ division of the same school and across the local education authority as a whole, there were 11 such accidents per year. After the 1937 accident the glass in the individual door within the boys’ division was toughened. After the coming into force of Section 10, the Local Authority’s policy was to install toughened glass in new and replaced doors but not to instigate a programme of pre-emptive replacement. There were no relevant safety standards as to the thickness of glass to be used in doors at the time of the accident.

- (a) It is important to note that whilst Veale J held the Local Authority liable both in common law negligence and for breach of Regulation 51 of the 1959 Regulations, he considered the two separately and emphatically did not find the breach of Regulation 51 proven simply because, on the facts, a foreseeable risk had been created.
- (b) Critical to our argument is the finding by the trial Judge, Veale J, that the duty under Regulation 51 of the 1959 Regulations was absolute, i.e. an objective level of reasonable assurance as to health and safety had to be maintained. In doing so he rejected precisely the same argument which had been run by Patrick O'Connor QC in *Lyes*, namely that Regulations dealing with the condition of the premises require reasonable foreseeability to be actionable and hence add nothing to the common law. His judgment contained the following [363]:

“What then is the nature of the duty? Counsel for the plaintiff says that, if in fact there is a breach in the sense that premises are not reasonably safe or that safety is not reasonably assured, this statutory duty is wider than any duty at common law, because —so the argument runs—the test is objective; that is to say, it matters not what this authority or other authorities knew or did not know, did or did not do, or what the past experience was. If safety was not reasonably assured, that, says counsel, is an end of the matter, though he concedes that, at common law, such matters as past experience would indeed be relevant. The local education authority, on the other hand, say that the regulation adds nothing to the common law duty. On the facts as I find them to be in this case I think this argument is largely academic; but it is an important point and I think it right to express my view upon it.

In my judgment, the argument of the plaintiff on this point is right. I think the duty to secure (that is the word in the section) that safety shall be reasonably assured (which are the words of the regulation) is an absolute duty and the test of breach or no is objective. Putting it another way, if safety is not reasonably assured in the premises in fact, then there is a breach. (Emphasis added)

- C9. *Ward v Hertfordshire County Council* [1969] 2 ALL ER 807 involved a young child who fell against a freestanding school boundary wall made from locally ubiquitous flint and was injured. A claim was brought both in negligence and under Regulation 51. The Court of Appeal, reversing the Judge at first instance (Hinchcliffe J), found against the Claimant in negligence, on the grounds, inter alia, that had the wall been built of brick and not flint, it

was likely that injury would still have occurred. They agreed with him that that Regulation 51 of the 1959 Regulations did not apply because, inter alia, the boundary wall did not constitute part of the 'school buildings'. It has to be said that their reasoning on the regulations is somewhat opaque in that they do not accurately cite its provisions, but that is not a matter which need detain us. What they did not do, was reject the approach of Hinchcliffe J in his expression of the view that Regulation 51, if applicable, was strict in nature. He held @ 811

“The infant plaintiff has not established, to my satisfaction, that the defendant was in breach of reg 51 of the Standards for School Premises Regulations 1959; I accept the submission made by counsel for the defendant, that this case does not really fall within reg 51, because the accident took place on a boundary wall and the boundary wall cannot be said to be part of the building. That seems to me to be a submission that is right in law; and is one full of common sense. I take the view that this regulation relates to a building in the conventional sense and that it is the occupants of the building whose safety is being considered. If I had thought that these walls fell within the ambit of the regulation, then I would agree with Veale J who held in Reffell v Surrey County Council, that an absolute statutory duty is created.”

It would appear, therefore on issue of the absolute nature of the 1959 Regulations the judgment of Veale J and Hinchcliffe J amount to binding authority on subsequent first-instance Judges by application of the reasoning in respect of stare decisis set out in *Colchester Estates v Carlton Industries [1986] Ch. 80*. However, matters go beyond mere precedent: the proposition is (to quote Hinchcliffe J) 'full of common sense'. The approach adopted by both Veale J in *Reffell* and Hinchcliffe J in *Ward*, in respect of 'reasonably assured' surely accords with the parliamentary intention. Parents who have no choice but to commit their children to school and hence to exposure to whatever dangers may lurk within the curtilage, would require 'reasonable assurance' that their children were safe, not assurance that they would be reasonably safe.

C10. Finally, in the light of that, let us return to ‘efficiency’ once again and conclude that if the phrase ‘reasonably assured’ has been held to create a strict liability, then one which tends to the same statutory intention (i.e. the creation and maintenance of a safe environment) which does not use the word ‘reasonable’ must also be strict. Thus it is that one can say with confidence that the requirement for efficiency is also, and necessarily, a strict one. Whilst drawing analogies from regulations passed under other Acts can be problematic, it is worth noting that there are other contexts in which ‘maintaining in an efficient state’ has led to the finding of an absolute obligation, namely in respect of Reg 5 Workplace (Health, Safety & Welfare) Regulations 1992; Reg 5 Provision and Use of Work Equipment Regulations 1998; Regulation 4 and 7 Personal Protective Equipment Regulations 1992 – see also *Stark v Post Office* [2000] ICR 1013).

The ‘kept in repair/hygiene’ requirement

C11. Again, it is to be noted that the phrase does not rely in any way on the modifier of reasonableness, either in respect of foreseeability of harm, or as to the knowledge of the existence of the disrepair, or as to the steps to be taken to remediate the disrepair. It is therefore strict.

C12. The meaning of ‘repair’ is self-evident, but what of ‘hygiene’? It is not defined within the Regulations but, again, it is an ordinary English word. The OED describes it thus:

“That department of knowledge or practice which relates to the maintenance of health; a system of principles or rules for preserving or promoting health; sanitary science”

The use of this word (in the period after 1951) widens considerably the ‘repair’ requirement and looks to the overall effect of the building on the health of its occupants. Thus there is a great deal of overlap between this requirement (first encountered in Regulations 6, 29 and 50(a) of the Schools Grant Regulations 1951 (SI 1951/1743) and Regulation 51 of the

Standards for School Premises Regulations 1959 (SI 1959/890) ‘...*health and safety of the occupants...shall be reasonably assured*’.

We may therefore safely conclude that not only are these duties strict, they are multiple and overlapping so far as the LEA is concerned.

The “...adequate arrangements shall be made for the health and safety of the pupils and staff” requirement

C13. All that need be said here is to repeat that there is, yet again, no modifier of ‘reasonableness’.

D: SO WHAT? SOME EXAMPLES

D1. I have, now, I hope established to your satisfaction, that these duties are strict. What does this mean in practice? It means that where the following (commonly encountered) situations are met, liability will follow provided it can be shown that, on balance, the circumstances amounted not to merely creating the opportunity for exposure but did in fact lead to exposure.

D2. If it is known, for example, that suspended ceiling tiles will have to be moved from time to time then the school is not in an ‘efficient state’, nor is health and safety ‘reasonably assured’ (especially by reference to ‘materials used’), nor are the premises maintained in a ‘proper state of hygiene’ nor have ‘adequate arrangements been made to ensure the health and safety of the pupils and staff’ if:

- (a) asbestos ceiling tiles are used and retained at all; especially where
- (b) no separation is maintained between the work causing the tiles being moved and the children and staff and no sufficient vacuuming/wet sweeping is put in place prior to re-use of the class (or after the mid 1970s, no fibre count is undertaken).

The same breaches could be prayed-in-aid in respect of any music room which had asbestos sprayed onto the inner surfaces of the sound-deadening walls etc.

- D3. The casual damage to asbestos bearing products, be they ceiling tiles, AIB infill panels in internal walls, asbestos in structural columns and whether that damage is malicious or not, amounts to a failure to keep the school 'in repair'. The breaches set out in paragraph D2 would apply to any failure to instil into the children the understanding that the school contained asbestos which was dangerous if disturbed and hence why they must not punch holes in walls (a surprisingly common allegation); or knock bags and shoes against infill panels; or try to dislodge ceiling tiles; or go into the boiler room at lunch or to smoke; knock lagging on pipes etc.

E: AND WHAT IF I'M WRONG?

- E1. Any sensible advisor to LEAs/their insurers will want to explore whether in fact the liability above requires proof of foresight of risk and that the scope of the duty of care was sufficiently onerous to require action on even a small risk. That is an entirely rational approach. There are, however, a large number of reasons for concluding that the common law, even in the absence of statutory intervention, sets a peculiarly high standard in respect of schools.
- E2. First, schools know that the presence of the children on their premises is compelled. They have no choice but to be there.
- E3. Second, schools know that they have within their premises, 'young lungs' that is people who, on inhaling asbestos fibre will be carrying the burden of the risk created for many decades – and hence will face a disproportionate risk of developing mesothelioma.

- E4. Third, as we have seen above, the role of the LEA was as site occupier and it was effectively to enforce building regulation standards. They went further and designed schools and the materials used. They did so as organs of the state with all the knowledge and resources of the state behind them.
- E5. Fourth they were large employers who owed a series of statutory duties to the staff on site. They could not fail to act in accordance to their pupils where they had a duty to act, pursuant to statutory duty, in respect of their employees (see *Wright v Dunlop & ICI* (1972) 13 KIR 255). Of particular relevance are the established duties upon an employer to:
- (a) ensure, by enquiry, materials they provided to their employees to work with were reasonably safe (*Ogden v Airedale Health Authority* [1996] 7 Med LR 153);
 - (b) Specifically in the context of exposure to asbestos dust, to assess the level of exposure and (provided it was above medical de minimis) whatever that level was, to reduce the same by the taking of all reasonably practicable steps (*Maguire v Harland & Wolff* [2005] EWCA Civ : Government publication EH10 (1976))
- E7. Fifth, and most important of all, the scope of the duty of the school at common law has been the subject of express Judicial determination – by Edmund Davies J in the case of *Lye*. Relying on *Esber MR* in *Williams v Eady* (1893) 10 TLR 41 he held that the duty on the schoolmaster (for which now read the local authority) was to take ‘*such care of his [pupils] as a careful [parent] would take of his [children]*’¹ but with two crucial additions:
- (a) This test is applied not to children as they face risks in the home, but as they face them at the school where it can be seen “*there was more noise and more skylarking; more hazard at school and more horseplay, facts which no one can deny, human*

¹ *In the original all the characters are presumed male – I have simply de-gendered them!*

nature and boys' youthful human nature being what it is" and where children by their ordinary nature had a tendency 'to do mischievous acts and their propensity to meddle with anything that came their way'. In short, the test was this and the result arising from it, with the case was as follows:

"I hold that the standard is that of a reasonably prudent parent judged not in the context of his own home but in that of a school, in other words, a person exhibiting the responsible mental qualities of a prudent parent in the circumstances of school life. School life happily differs from home life. The more the merrier. A lot of pupils are apt to make much more noise even than a few children in a small home and there is, to use an expression of one of the witnesses, more skylarking, and a bit of rough play, but the reasonable parent in school premises would be mindful of such considerations. Was this glass too thin? In my judgment it was. It may be that the consequences of the decision I have arrived at in this case may be widespread. If they are widespread and lead to greater safety in the care of the young then no consummation could be more devoutly be desired."

- (b) This test applied not just to the conduct of the staff but to the state of the school premises as well.
- (c) The test applied to latent dangers – and will equally apply to asbestos materials in situ as it did to door-mounted glass which was insufficiently robust for school life. The window in the door struck by Lye met its primary purpose of providing vision and illumination perfectly adequately it is just that in use it created a latent danger. Similarly, the asbestos board in a school internal wall or ceiling, does its 'main job' perfectly well: it is just that when disturbed it gives off dust which is a danger. The analogy is therefore entirely apt.
- (d) The common law test actually folds in neatly to the 'reasonably assured' test under the *Standards for School Premises Regulations 1959*. Would any parent either be 'reasonably assured' or any school not liable at common law, if it was clear

that woven into the fabric of the school was a substance which, if disturbed via ‘rough and tumble’ could materially increase the risk of a fatal cancer in their child albeit many decades hence?

- E8. The brute reality for those bearing the onerous burden of seeking to exculpate schools in the context of asbestos liability, that it matters little whether one applies statutory duties strictly or, once they are understood properly, the common law duties in negligence.

MICHAEL RAWLINSON QC

24.08.20

NOTES

ⁱ Practising from 12 King’s Bench Walk, Temple, London EC4Y 7EL (rawlinson@12kbw.co.uk) and King’s Chambers, Manchester, M3 3FT (mrawlinsonqc@kingschambers.com)

ⁱⁱ This can create problems where this the early medical contacts state ‘asbestos contact denied’: Dr John Moore-Gillon is surely correct when he tutors young medics not to use that phrase but rather to make the more accurate recording in the medical notes ‘no asbestos exposure positively recalled at the time of asking’.

ⁱⁱⁱ By way of completeness the definition of a ‘grammar school’ is found in Regulation 30 of the Primary and Secondary School (Grant Conditions) Regulations 1945 (S.R. & O. 1945 No. 636)

^{iv} **s10 Education Act 1944 — Requirements as to school premises.**

(1) *The [Secretary of State]... shall make regulations prescribing the standards to which the premises of schools maintained by local education authorities... are to conform, and such regulations may prescribe different standards for such descriptions of schools as may be specified in the regulations.*

(2) *Subject as hereinafter provided, it shall be the duty of a local education authority to secure that the premises of every school maintained by them ...[to] conform to the standards prescribed for schools of the description to which the school belongs...*”

^v **s542 Education 1996 .— Prescribed standards for school premises.**

(1) *Regulations shall prescribe the standards to which the premises of schools maintained by local authorities.. are to conform; and.. different standards may be prescribed for such descriptions of schools as are specified in the regulations.*

(2) *Where a school is maintained by a local authority, the authority shall secure that the school premises conform to the prescribed standards*

^{vi} **s100 Education Act 1944 - Grants in aid of educational services**

(1)*The Minister shall by regulations make provision :—*

(a)*for the payment by him to local education authorities of annual grants in respect of the expenditure incurred by such authorities in the exercise of any of their functions relating to education...*

(b) for the payment by him to persons other than local education authorities of grants in respect of expenditure incurred or to be incurred for the purposes of educational services provided by them or on their behalf or under their management or for the purposes of educational research...

(3) Any regulations made by the Minister or the Minister of Health under this section may make provision whereby the making of payments by him in pursuance thereof is dependent upon the fulfilment of such conditions as may be determined by or in accordance with the regulations, and may also make provision for requiring local education authorities and other persons to whom payments have been made in pursuance thereof to comply with such requirements as may be so determined"

^{vii} *The Education (Independent School Standards) (England) 2003 (SI 2003/1910)*

^{viii} *The insured party to a contract of indemnity is often, of course, referred to as 'the assured'. Indeed the use of the word within Marine Insurance was clearly sufficiently well established by the mid 16th Century that the first attempt to regulate the same in 1576 was in a body called the 'Chamber of Assurances' within the Royal Exchange. And what does a policy of insurance provide to the insured? Certainty that loss arising from a covered contingent event will be made good under the contract.*