

CLAIM No: OL304927

Neutral Citation Number: [2008] EWHC 3216 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Date: 19 December 2008

BETWEEN:

WINIFRED RICE Claimant
(Widow and Executrix of the Estate of
Edward Rice, Deceased)

- and -
SECRETARY OF STATE FOR BUSINESS First
ENTERPRISE AND REGULATORY REFORM Defendant

STUNTBRAND LINE LIMITED Second
Defendant

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

CLAIM NO: 40L00141

BETWEEN:

ROBERT FRANCIS Claimant
THOMPSON

- and -
SECRETARY OF STATE First
FOR BUSINESS Defendant
ENTERPRISE AND
REGULATORY REFORM Second
Defendant

STUNTBRAND LINE
LIMITED

Nigel Cooksley QC and Brian Cummins (instructed by John Pickering and Partners) for
the Claimants

Michael Kent QC and Michael Rawlinson (instructed by Beechcroft LLP) for the First
Defendant

The Second Defendant was not represented

Hearing dates: 3-5, 7 and 12 November 2008

Further written submissions served on 13 and 14 November 2008

Judgment

MR JUSTICE SILBER:

I. Introduction

1. Dockworkers who were employed at Liverpool Docks in the period up to 1967 were required to handle cargoes containing asbestos. In these consolidated proceedings, it is contended that two such dock workers have both suffered from asbestos-related illnesses which were contracted during such periods of employment.
2. Mr. Edward Rice worked as a dock worker at Liverpool Docks from February 1955 to 1967 with the exception of a period starting in 1961 until early in 1964 when he worked elsewhere. Mr. Robert Francis Thompson also worked as a dock worker at Liverpool Docks from 1966 to 1967. Sadly Mr. Rice has died. His wife brings a claim on behalf of his estate for damages as does Mr Thompson. For the sake of convenience, I will refer to Mr Thompson and Mr Rice as “the claimants”.
3. During the time when the claimants were employed there, Liverpool Docks was subject to the regime of the National Dock Labour Board (“NDLB”). The claimants contend that they contracted asbestos-related diseases while working for Clan Line in the unloading of asbestos. The second defendant is its successor-in-title but that company is now in liquidation and it has played no part in these proceedings. Thus the claimants are now pursuing their claims for damages only against the Secretary of State for Business Enterprise and Regulatory Reform (“the defendant”), whose predecessors took over the liabilities of the NDLB after it was wound up in 1989.
4. Quantum is agreed subject to liability in the case of Mr. Rice and also in Mr. Thompson’s case in which there is an additional issue on apportionment. It is said that there are other dock workers who are or who may be bringing similar claims against the defendant in respect of the NDLB’s breach of its duties but all the claims probably depend on their own facts.

II. The Issues

5. In a judgment ([2006] EWHC 1257) handed down on 26 May 2006 (“the 2006 judgment”), I held on a preliminary issue that the NDLB owed a duty of care to the claimants. The terms of this duty specified in that judgment are no longer relevant because when the Court of Appeal dismissed the defendant’s appeal ([2007] EWHC Civ 289) on 4 April 2007 (“the Court of Appeal judgment”), it held that:-
 - (a) The NDLB owed a duty of common law to take positive steps so as to prevent or reduce the exposure of the claimant to asbestos dust following their allocation to or selection by Clan Line; and
 - (b) “... *that to do nothing was not on the evidence an option available to the NDLB if they were to perform the duty which in my judgement they owed to the claimants*” (paragraph 44 per May LJ (as he then was) who gave the only reasoned judgment with which Keane and Smith LJ agreed).

6. In the Court of Appeal, Mr Michael Kent QC who appeared as he does in the present action for the defendant:-

“sensibly accepted before this court that, in the circumstances of their employment, injury to the claimants’ health from handling asbestos as they did was reasonably foreseeable” (paragraph 9).

7. During the course of the present trial in response to a question from me, Mr Kent was more explicit and he handed in a written document (“the concession”) in which it was conceded by the defendant (with my underlining added) that:-

“NDLB concede that in the periods 1955-1967 the conditions within the holds of the Clan Line ships during the unloading of asbestos cargo as described within the witness statements of the claimants, if proved, were matters of constructive or actual notice to NDLB and that such exposure gave rise to a foreseeable risk of some asbestos related pulmonary injury”.

8. As the concession of the defendant depends, because of the words underlined, on the issues raised on the allegations of the claimants in their witness statements being proved, it will be necessary to consider in Section III below if these allegations in the witness statements have been proved.
9. On the assumption that the allegations in the claimants’ witness statement are proved, the parties disagree as to what steps the NDLB should have taken to discharge its duty of care to the claimants. The claimants contend that a number of steps ought to have been taken by the defendant, such as first by issuing warnings to the dock workers and to the dock employers about the dangers to the dock worker’s health which would be caused by inhaling or coming into contact with asbestos dust; second by training the dock workers about those dangers; third by agreeing not to discipline dock workers for refusing to unload asbestos when it was dangerous to do so and finally by ensuring that the dock workers used respirators when they came into contact with asbestos dust.
10. The case for the defendant is that a warning should have been given to the dock workers by the NDLB but that it should have been in less robust terms than that suggested by the claimants. There is also a major issue on causation because the case for the defendant is that even if the NDLB had acted in compliance with its duty, then the claimants cannot show that the NDLB materially increased the risk of the claimants suffering the harm which was foreseeable. Furthermore it is said by the defendant that Mr. Thompson suffers from a divisible disease and therefore in order to recover in full, he must prove that if NDLB had complied with its duty of care, he would have avoided his injuries from contact with asbestos dust altogether or they would have been reduced to a negligible level, namely a level at which his risk of asbestos-related disease was not materially increased above that to which the population as a whole were exposed.

11. Mr. Nigel Cooksley QC counsel for the claimants does not disagree with this contention on causation in respect of Mr. Thompson but he submits that the case for Mr. Thompson satisfies this condition and so like Mr. Rice's executors, he can recover his damages in full.
12. It should also be recorded that subject to the question of liability the quantum of Mrs Rice's claim has been agreed subject to liability. The quantum of Mr Thompson's claim has been agreed subject not only to liability but also to apportionment.
13. As the factual issues in this case relate to the situation in Liverpool Docks as long ago as the 1960s prior to the end of the NDLB regime in 1967, there has been a limited amount of oral evidence while a number of witness statements have been admitted under the Civil Evidence Act 1995. There has also been expert evidence adduced by both sides. The claimants' experts were Professor Peter Turnbull, who is Professor of Human Resources Management and Labour Relations at Cardiff Business School and Mr. RB Clark of Morgan Finch, who is a health and safety consultant. The defendant called only one expert who was Professor Noel Whiteside, who is Professor of Comparative Public Policy at Warwick University.
14. The issues that have to be determined are:-
 - (a) Whether in the terms of the defendant's concession "*in the periods 1955-1967 the conditions within the holds of the Clan Line ships during the unloading of asbestos cargo[are] as described within the witness statements of the claimants*" are proved (Issue A) (see paragraphs 15 to 36);
 - (b) How should the NDLB have discharged the duties of care it owed to the claimants in the light of the risk of injury caused by the unloading of asbestos(Issue B) (see paragraphs 37 to 121);
 - (c) Whether NDLB was in breach of those duties(Issue C) (see paragraphs 122 to 126);
 - (d) Whether any breaches were causative of the illnesses suffered by each of the claimants(Issue D) (see paragraphs 127 to 168);and
 - (e) What damages (if any) are payable to each of the claimants (Issue E) (see paragraph 169).

III. Issue A. The Conditions in the Docks

(i) The relationship between the claimants and the NDLB

15. During the hearing of the preliminary issue, there were complaints both in the 2006 judgment ([4A]) and in the Court of Appeal judgment ([6]) about the fact that the issue to be determined on that occasion was limited to ascertaining if a duty of care existed and that the issues then for determination did not include as they should have done the extent and nature of the duty. To ascertain the extent of the duty, it is now necessary to explain that it has already been decided by the Court of Appeal ([10]) that the relationship between dockworkers such as the claimants and the NDLB was not a conventional employer/employee relationship.

16. As I explained in some detail in paragraphs 5 to 9 of the 2006 judgment, the NDLB is a creature of statute namely the Dock Workers (Regulation of Employment) Act 1946 (“the 1946 Act”) which set up the NDLB scheme and which lasted until September 1967. I gratefully adopt the description of the NDLB given by May LJ who gave the only reasoned judgment in the Court of Appeal judgment when he explained that:-

“15. In summary, the structure of the Scheme was as follows. There were registered dock workers and registered employers. The dock workers were from time to time allocated to employers. When the allocated dock worker was working for a registered employer, for example unloading a ship, he was employed by the registered employer under a contract entitling him to payment at nationally or locally agreed rates. He was paid for this by the local board as agent for the employer. The local board arranged the allocation of dock workers who, where it was possible, were accustomed to the employer, his operations and cargoes. When they were not allocated to or working for a registered employer, as when they were unemployed in the reserve pool or on annual holiday, the dock workers were in the employment and under the control of the local board. The National Board had a function to make satisfactory provision for the training and welfare of dock workers, including port medical services, in so far as those did not exist apart from the Scheme.”

17. May LJ then described the mode of operation in Liverpool in this way:-

“16. The way in which the local board in Liverpool performed its functions in practice was as follows. Registered dock workers were required to attend for allocation of work at 8 am each day, and again at 2pm if they had not been allocated at 8am. They were herded into pens which were locked. Some were selected by employers; others were allocated by the local board. Those who were not selected or allocated remained in the reserve pool. Some dock workers were no doubt better suited by experience to particular employers. No doubt working for some employers was regarded as more congenial than working for others.

17. Each of the claimants was from time to time allocated to Clan Line to unload cargoes of asbestos in hessian sacks. Since the rates of pay for working for an employer were higher than the rates for those in the reserve pool, there was a strong incentive not to try to avoid working. It is not suggested that a dock worker allocated to Clan Line to unload asbestos had any real choice whether to do that work, if he wished to remain employed as a registered dock worker”.

18. The significant features of the NDLB scheme as a result of the regulations made under the 1946 Act were that:-

(a) a dock worker registered with the NDLB was unable to protect his own interests because he was obliged to do such work for which he was considered by the Board to be suitable;

(b) if the dock worker did not comply with the NDLB's instruction, he was liable to disciplinary procedures, which significantly included the ability to prevent the dock worker remaining within the NDLB scheme with the consequent and inevitable loss of his livelihood as non-registration precluded a dock worker from working in the docks;

(c) the dock worker had no right to refuse to do the work that he was told to do or to make any inquiries about the cargo to be unloaded as his duty was to obey the instructions;

(d) the NDLB also had the duty to make satisfactory provision for the welfare and training of dock workers if the port employers failed to do so. The evidence indicates that many employers were often lax in these areas, which meant that as a consequence of the default of those employers, the NDLB had those important obligations;

(e) in any event, the NDLB had the duty to carry out inquiries about what registered employers were doing in respect of the "training and welfare of dock workers" in order to ascertain whether they had the obligations because of the employer's default. The "welfare" of the dock workers in this context must have included conditions which would adversely affect the health of the dock workers; and

(f) as May LJ explained in the Court of Appeal judgment, "44...The NDLB knew or ought to have known that unloading asbestos in hessian sacks carried a serious risk of serious injury to the dock workers' health, to put it no higher for the years in question. In these circumstances and on these quite startling facts, in my judgement, the policy of the statute can only be seen as enabling a relationship such that the law should impose a common law duty of care. This was not a broad target power or duty directed at the public at large. It was on the facts a specific duty requiring the NDLB to protect their individual employees against a known serious risk to their health, and which, in my judgement and in agreement with the judge, it is fair, just and reasonable to impose".

(ii) The claimants' contact with asbestos dust.

19. It is common ground that asbestos cargoes were unloaded on a number of occasions in Liverpool docks. Mr Thompson and two other former dock workers Mr William Webb and Mr Terence Kelly gave oral evidence to that effect while similar evidence was contained in a number of statements made by former dock workers, which were adduced under the Civil Evidence Act 1995. Not surprisingly in the light of the time which has now elapsed since the 1960s, there is no agreement as to the precise number of occasions when each claimant would have been involved in unloading the asbestos.
20. Mr Clark, who was the only expert called on health and safety matters, undertook an extrapolation exercise as a result of which he concluded that there must have been 2 or 3 asbestos cargoes arriving each month in Liverpool Docks but they would not all have been unloaded by the claimants. He accepted that this was a very broad estimate and also that the estimate was based on the maximum load of asbestos being carried on each ship. It is, however, certain that the number of cargoes of asbestos arriving each month would have been substantially higher because there was clear and consistent evidence that many ships which brought asbestos to Liverpool Docks carried the asbestos as part of a mixed cargo.
21. Mr Rice's evidence in his witness statement was that he estimated that he unloaded 30 cargoes of asbestos between 1955 and 1965 although it is now clear that the years between 1961 and 1964 should be excluded from his estimate as Mr. Rice was not then working in the docks. Mr Thompson's evidence was that he worked regularly for Clan Line as well as other shippers but most of the asbestos which he unloaded was for Clan Line. His oral evidence was that he may well have unloaded asbestos for Clan Line once every three weeks. Mr Kelly, who was another dock worker employed at Liverpool Docks but in a different part from the claimants, considered that he would have unloaded an asbestos cargo approximately every six weeks and as although he did not work in the same part of the docks as the claimants, I have no reason to believe that his experience was not typical of the parts of the docks where the claimants worked. My conclusion is that both claimants were required to unload asbestos reasonably frequently perhaps every six weeks or so during the time when they worked for Clan Line as required but it is unnecessary to reach a conclusion on the precise number of occasions when this occurred.
22. There are three different types of asbestos and in the descending order of the amounts imported in 1965 they are first Amosite which is brown, second Chrysotile, which is white and third Crocidolite which is blue and which is the most dangerous. The claimants in this case handled only the white asbestos. The asbestos being relatively light was typically loaded on top of other cargo and the unloading of it would take about a day.
23. Paper sacks were originally used for the packaging of asbestos but they were found to be unsatisfactory as they had a tendency to burst with the consequence that the claimants and other dock workers came into contact with much asbestos dust. Hessian sacks were also used and if unlined, they too did not prevent asbestos dust escaping. So the safest method of packing asbestos was a hessian

bag with a lining of either polythene or paper until the time after the end of the life of the NDLB when asbestos cargo was packed in pallets and containers.

24. There was a disagreement as to how the asbestos was actually packed during the period up until September 1967 when the NDLB Scheme ceased to operate but it is not necessary for me to resolve it because as I will explain asbestos dust escaped regularly irrespective of which mode of packing was adopted. Mr Rice's statement was that the asbestos was packed in hessian sacks and he describes in his witness statement that there was "*asbestos powder coming out of the bag if you patted or squeezed them*". I accept this evidence as explaining why so much asbestos dust escaped during the unloading process and it is common ground between counsel, correctly in my view, that Mr Rice was referring to unlined sacks.
25. Mr Thompson described in his witness statement the asbestos as usually being in hessian sacks and in paper sacks. It seems clear from the rest of his statement that he was referring to unlined sacks unless the lined hessian sacks were as useless as unlined ones for the purpose of preventing spillage. Mr Webb, who was another dock worker during the life of the NDLB scheme, gave clear evidence, which I accept, of the asbestos cargo being packed in unlined hessian sacks. He was clear in his oral evidence when he explained that "*you could see they weren't lined*". As I will explain in paragraph 85(c) below, it can be inferred from a letter dated 27 October 1965 sent by a civil servant at the Ministry of Labour that unsealed hessian bags were still then being used. Furthermore, in November 1966 dock workers in London refused to handle asbestos and the Transport and General Workers Union would appear to have been involved. The Transport and General Workers Union gave notice that it had advised its members working within the Ocean Trades that with effect from 2 January 1967 that they should not handle asbestos unless it was packed in bags which were impervious to the escape of dust or in containers which would have the same effect. All this evidence satisfies me that certainly at least until the end of 1966, asbestos was still arriving at docks in the United Kingdom, which would include the Liverpool Docks in bags which were not impervious and from which therefore asbestos dust could and did escape with great frequency.
26. There is a dispute about whether the asbestos was properly packed but it is not of particular importance as there was clear and undisputed evidence of asbestos escaping from all types of bags whether in the hold or when being unloaded. Mr. Webb who was a careful and convincing witness stated that he worked in a different pen at Liverpool Docks from the claimants but it is clear that the hessian bags in which the asbestos arrived were not lined. His evidence is consistent with that of Mr. Rice who explained that the asbestos was packed in hessian bags and "*if you patted or squeezed them, the asbestos powder came out*". No cogent evidence was adduced to show that the asbestos arriving in Liverpool docks was regularly packed securely in lined bags during the period until the end of the NDLB scheme.
27. I have concluded that while the claimants were working under the NDLB regime, the asbestos cargo was probably not packed in lined bags but I cannot be sure because the witnesses were being asked about events which occurred more than 40 years ago and which they would have had little cause to remember at the time.

In any event, it is not of great importance to ascertain how the asbestos was packed because even if it was packed in lined hessian bags, the bags are likely to have split perhaps because hooks were used to lift the asbestos bags or because the dockworkers like Mr. Thompson used for the purpose of unloading asbestos bags a device called a “*scratcher*” which was a short steel or metal with short nails or hooks on it; this device might well have caused holes in paper or hessian bags.

28. Mr Kent accepts realistically and correctly in my view that damage to asbestos bags was a feature of the cargoes and indeed the evidence shows convincingly that considerable quantities of asbestos spilled from the sacks when they were handled at different stages. In the first place, this occurred when the asbestos bags were in the ship’s hold and much loose asbestos was lying loose and amongst the other sacks as the asbestos bags had previously burst to some extent. Further, substantial spillage of asbestos occurred when the asbestos bags were moved and were handled by the dock workers perhaps either by the scratchers or by hooks when used. In addition, many of the bags containing the asbestos were also damaged when they caught on the side of the ship during the unloading process. Mr. Webb gave evidence of asbestos dust falling from the slings.
29. There was much evidence that when the asbestos cargoes were being unloaded there were substantial quantities of asbestos dust in the air which rained down on the dock workers unloading the asbestos. Mr Thompson spoke about the sacks containing asbestos dust bursting and in my view he meant that there was some form of substantial leakage from that quantity of bags containing asbestos dust as opposed to them bursting open fully. I am not surprised that more than half the bags were damaged to some extent because of the evidence of the frequent occasions when the claimants and other dock workers were covered with asbestos dust.
30. It is necessary to bear in mind that the dock workers had the task of loading the sacks of asbestos onto slings which were then to be lifted up from the hold and that to do so they would use scratchers. In my view, these were the universal way of picking up the asbestos bags and again I accept the evidence of Mr Webb. It is possible that one of the reasons why scratchers were used was because some of – but not by any means all of - the asbestos bags had the words “*no hooks*” written on them.
31. There was a great deal of evidence of the amount of asbestos dust to which the claimants and the other dock workers were subjected. Mr Rice talked of the asbestos dust showering down on him and the asbestos dust hanging in the air for hours after it was unloaded. Mr Thompson stated that his clothing was covered in asbestos dust when they unloaded that cargo. Similar evidence was given by Mr Webb. My clear conclusion is that the claimants and the dock workers who unloaded asbestos cargo were invariably or extremely frequently covered with substantial quantities of asbestos dust. As I explained in paragraph 58(c) of the 2006 judgment, the NDLB knew through its local boards (if not through its medical staff) that the claimants were coming in to contact with asbestos dust which had not been properly packed and this finding has not been challenged on this appeal. In my view having heard the evidence, I am satisfied that the NDLB knew in this way that there were large quantities of asbestos dust which the claimants had to inhale.

32. I have no doubt in concluding in addition that there was clear evidence that there was heavy concentrations of asbestos dust to which the claimants were exposed during their employment as dock workers while unloading the asbestos from Clan Line ships. Therefore, it becomes necessary to consider what protective clothing was given to the claimants while unloading the asbestos. The evidence of the claimants and Mr Webb, which was not challenged, was that the only protective clothing equipment given to the claimants while unloading asbestos consisted of cotton, muslin or hessian masks. I accept that the use of any barrier placed between the nose/mouth from the source of dust would reduce to some extent the bulk inhalation of asbestos dust but I am quite satisfied that those masks proved unusable after a short period and that they were totally ineffective in preventing the claimants from inhaling substantial quantities of asbestos dust. This was particularly so because the masks when they became dirty and contaminated were not replaced even if a request was made. In any event, it is noteworthy that Mr Rice complained that muslin cloth was often not available and so he then had to improvise using a handkerchief.
33. There is evidence that during the life of the NDLB, respirators were never provided to the claimants or to any dock workers handling asbestos despite being available since 1939. Similarly, the claimants were neither warned about the dangers of inhaling asbestos dust nor trained about these matters.
34. In the light of all this evidence, my factual findings are that:-
- (a) Between 1955 and 1961 and between 1964 and 1965 in the case of Mr Rice and in 1966 and 1967 in the case of Mr Thompson, the claimants were regularly exposed to and covered by heavy concentrations of asbestos dust in the course of their employment as dock workers whilst unloading asbestos packed in either unlined hessian sacks or paper sacks from Clan Line ships or from damaged lined sacks;
 - (b) Neither claimant was given any information nor any warning that exposure to asbestos dust would give rise to a risk of pulmonary or any injury whatsoever;
 - (c) Neither claimant received any training about how to handle asbestos cargo and how to avoid contact with asbestos dust or to how they might reduce their exposure to asbestos dust while unloading asbestos bags or other processes which would have entailed such exposure;
 - (d) The only protection provided against such exposure was the occasional supply of simple muslin or improvised hessian which was used like a surgical mask but which became unusable after a short period of use and which were not always replaced. In any event, these masks even when issued provided no effective protection to the claimants against the inhalation of asbestos dust; and

- (e) No respirators were provided to or used by the claimants when they were at risk of coming into contact and came into contact with asbestos dust.

35. As I explained in paragraph 7 above, Mr. Kent conceded (with my emphasis added) that:-

“NDLB concede that in the periods 1955-1967 the conditions within the holds of the Clan Line ships during the unloading of asbestos cargo as described within the witness statements of the claimants if proved, were matters of constructive or actual notice to NDLB and that such exposure gave rise to a foreseeable risk of some asbestos related pulmonary injury”.

36. I am satisfied that that the matters set out in the claimants’ witness statements have been proved and so I will regard the matters set out in the claimants’ witness statements as *“matters of constructive or actual notice to NDLB and that such exposure gave rise to a foreseeable risk of some asbestos related pulmonary injury.* I should add that if Mr Kent had not made the concession, I would have reached the same conclusion in the light of the matters set out in paragraphs 19 to 34 above and paragraphs 51 to 110 below.

IV. Issue B How should the NDLB have discharged the duty of care it owed to the claimants in the light of the risk of injury caused by the unloading of asbestos?

(i) Introduction

37. As I have explained, the Court of Appeal stated that the NDLB had an obligation to take *positive* steps in order to perform its duty of care to the claimants. There is substantial dispute about the extent and the nature of the duty of care owed by the NDLB to the claimants. It is common ground that the extent and nature of the duty depends on the state of knowledge of the degree and the nature of the risk of injury to the claimants caused by coming into contact with asbestos dust when they were working as dockworkers during the life of the NDLB but there is disagreement about the extent and the nature of the risk and what was known about it at different times.

38. The case for the claimants is that there was a substantial risk of serious illness to dockworkers caused by even *minimal* contact with asbestos dust while the case for the defendant was that this risk only arose if there was contact with large quantities of asbestos dust. Another area of dispute is that Mr. Cooksley contends that the duty of care and any warning should have related to the risk of mesothelioma but Mr. Kent disagrees.

(ii) The rival contentions

39. The case for the claimant is that the NDLB should have:-

- (a) warned the registered dock workers of the risks of exposing themselves to asbestos in the way set out in paragraph 43 below and/or to have trained the registered dock workers as to how to avoid or minimise such risks – whether or not this led to their unions applying collective pressure;
- (b) requested that the port employers provide masks and respiratory equipment, extraction plant or equipment or arrangements to dampen the asbestos during handling and transport for asbestos in sealed pallets or impermeable packaging;
- (c) warned the registered port employers of the risk of exposing their employees to asbestos;
- (d) informed registered dock employers and workers that the dock workers would not be disciplined for refusing to unload asbestos in an unsafe condition and without sufficient safety measures; and
- (e) otherwise encouraged or persuaded the port employers to take steps to minimise the risk of exposure of dock workers to asbestos dust.

40. The case for the defendant was that the NDLB would have satisfied the duty of care imposed on it just by giving different warnings to each of the claimants which put the level and nature of the risk of coming into contact with asbestos dust at a much lower level than the warnings proposed by Mr. Cooksley and the exact terms of which would depend on the period of their employment. Further, the NDLB was not according to Mr. Kent obliged to provide respirators to the claimants or to inform them that they would not be disciplined if they failed to unload asbestos because it was dangerous to do so.

41. There is also a dispute between the parties on whether if the NDLB had complied with any of its duties, there is a sufficient connection between such breaches and the illnesses suffered by the claimants as to enable them to recover and I will return to consider these issues.

(iii) *What warnings should have been given to the claimants by the NDLB?*

42. It is common ground between the parties that the NDLB should have given some warnings to the claimants about the effect of contact by them with asbestos dust but the issue between the parties essentially relates to the terms of the warnings, which ought to have been given by the NDLB to the dock workers and the port employers relating to first the risk of exposure to asbestos dust and second the need for respirators. This entails consideration of the knowledge of the extent of the risks of the claimants inhaling asbestos dust up to the end of the NDLB regime in 1967.

43. The claimants' case is that the advice which should have been given to dockworkers like the claimants was that:-

“Throughout the period between 1955 and 1967, dockworkers should have been warned as follows:

That for many years, asbestos had been recognised as a highly dangerous substance and the Factory Inspectorate had advised that the inhalation of asbestos dust should be prevented as far as possible;

That heavy concentrations of asbestos dust could cause asbestosis, a progressive fibrosis of the lungs which could lead to death, and could also lead to the development of lung cancer [from about 1960, there should have been added to the warning that there was an increasing association between asbestos exposure and a more virulent form of lung cancer known as mesothelioma];

That the Factory Inspectorate had advised that due to the high concentration of asbestos dust because of the confined nature of the hold, dockworkers unloading sacks of asbestos, especially when the sacks consisted of unlined hessian, should wear an approved dust respirator;

That the employers had been requested to provide respirators, not just for the unloading of asbestos but for any cargo which involved substantial quantities of dust, thereby exposing dockworkers to the risk of bronchitis;

That the employers had also been requested to ensure that asbestos was packed in impervious bags,

That if the dockworkers found that they were being asked to unload unlined hessian or paper sacks without approved dust respirators and with tools which were likely to rip or puncture the sacks thereby increasing the spillage and dust, they would not be disciplined if they refused to unload cargoes in such circumstances;

That dockworkers could reduce their exposure to asbestos dust if care was taken in the unloading process not to rip, puncture or otherwise damage the sacks, not to disturb asbestos which had already leaked from the sacks and to remove themselves so far as possible from any clouds of dust which do form, even if these steps resulted in a slower rate of unloading;

That when clearing up after the unloading process, the loose asbestos dust lying on surfaces should be damped down first to avoid unnecessary quantities of dust;

That in the event that the NDLB could not persuade the employers to supply approved dust respirators for use during the unloading of dusty cargoes, the NDLB would provide

dockworkers with the equipment which could be obtained through a recommended local retailer and paid for in weekly instalments;

The above warnings could also have been incorporated in the NDLB's extensive training courses where more detailed information and instructions could have been given".

44. The case for the defendant is that much less stringent warnings were required and that they were different in the case of each claimant. In the case of Mr. Rice, the only warnings which were required to be given by the NDLB according to Mr. Kent were in the words of paragraph D2(1) of the defendant's closing written skeleton argument that they:-

"did not need to extend beyond a generalised indication of large quantities of asbestos should be avoided as it might cause progressive lung disease".

45. In the case of Mr. Thompson, he was only registered in July 1966 and the case of the defendant is that again in the words of paragraph D 2(2) of the defendant's closing written skeleton argument:-

"the warning ought to have been supplemented so that he was advised, that when encountering either large quantities of asbestos dust lying loose or unlined hessian bags, respirators ought to be worn or (in the case of the latter) the rate of discharge slowed down".

(iv) *The approach to the dispute on the risk to the claimants from asbestos dust.*

46. It is necessary to consider what was known in the relevant periods of the claimant's employment during the life of the NDLB about the dangers to those working in environments in which they came into contact with asbestos of asbestosis, lung cancer and mesothelioma. This would include consideration of how much contact with asbestos dust was needed before the claimant would risk becoming infected especially as the defendant's case was that the warnings only had to relate to contact with "*large quantities of asbestos dust*". It will be necessary to consider the relevant material in a chronological manner.

47. In carrying out this exercise, I will bear in mind six significant matters. First, as May LJ explained in the Court of Appeal judgment:-

"45...it would be erroneous to apply values of the early 21st century to the very different world of 50 years ago".

48. Indeed much of what was stated about the dangers of contact with asbestos dust in earlier times has now been shown to have seriously underestimated the dangers of asbestos dust with tragic consequences. I will consider the content of the duty of care of the NDLB in the light of the information known at the time.
49. Second, I bear in mind as Mr. Kent explained was the case that the background to the particular fact-specific reasoning of Tucker J in **Walker v Port of London Authority** (4 March 1988) in which a successful claim was brought by a dock worker's widow for damages after her husband had died from inhalation of asbestos dust. The reasoning and the conclusions in that judgment on which I placed weight in the 2006 judgment depended on the specific facts of that case, which were different from the present case; the defendant in that case was the employer of the claimant while the NDLB was not at any relevant time the employer of either claimant (see paragraph 10 of the Court of Appeal's judgment).
50. I also accept that the defendant employer in the **Walker** case had powers of control over the way in which the deceased dock worker did his work while the NDLB did not have the same or similar powers of control over the claimants. Nevertheless much of the evidence adduced which related to medical knowledge in the **Walker** case on the issue of the foreseeability of incurring an asbestos related illness as a result of slight contact with asbestos is also relevant to this case. I will however consider the state of medical knowledge afresh in determining the nature of the NDLB's duty of care to the claimants as the submissions that were made and the evidence adduced at the present hearing on that issue were more detailed than those made and adduced for the 2006 hearing. In doing this, I will have to bear in mind that "*the NDLB had a statutory duty to make satisfactory provision for the health of registered dock workers in so far as this did not exist apart from the scheme*" (paragraph 26 of the Court of Appeal judgment).
51. Third, I will consider the published medical literature on the dangers of contact with asbestos dust in a chronological order in order to ascertain if and when particular warnings about particular risks of contact with asbestos should have been given by the NDLB to the claimants and other dock workers in Liverpool about the dangers of inhaling asbestos dust. A helpful starting point is to be found in the overview to this issue which was given by Lord Bingham of Cornhill in **Fairchild v Glenhaven Funeral Services** [2003] 1 AC 32 when he was summarised the development of knowledge of the risks of asbestos exposure leading to mesothelioma by explaining that:-

"6. It has been recognised for very many years, at any rate since the "Report on Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry" by Merewether and Price in 1930 and the making of the Asbestos Industry Regulations 1931 (SR &O 1931/1140) that it is injurious to inhale significant quantities of asbestos dust. At first, attention was focused on the risk of contracting asbestosis and other pulmonary diseases" (Page 42)

and

"7. From about the 1960s, it became widely known that exposure to asbestos dust and fibres could give rise not only to asbestosis and other pulmonary diseases, but also to the risk of developing a mesothelioma. This is a malignant tumour, usually of the pleura, sometimes of the peritoneum...But the incidence of the tumour among those occupationally exposed to asbestos dust is about 1,000 times greater than in the general population..." (Page 43).

52. Fourth, I will consider the state of medical knowledge at certain different selected times to determine how the NDLB ought to have discharged the duties of care it owed to the claimants in the light of the risk of injury caused by the unloading of asbestos. The first such time was in 1955 when Mr. Rice first started working as a dock worker; the second was in 1960 after a significant report was published; the third time was in 1964 when Mr. Rice started his second period of work as a dock worker; the fourth time was in about July 1966 when Mr. Thompson started working as a dock worker and the final time was between July 1966 and the end of the NDLB scheme in Autumn 1967.
53. Fifth, Mr. Kent also seeks to derive assistance in presenting his submissions from the fact that there was not a single case of asbestos-related disease arising from work in the dock yards reported during the period before the end of the NDLB regime in 1967 and which could have put the NDLB on notice. The difficulty with that argument is that it has long been established that there is a substantial time lag or gestation period between the time when asbestos dust is inhaled and the emergence of any illness let alone the death of the dock worker. This point has been made in much of the medical literature as for example in Dr. Leathart's article referred to in paragraph 76 above at page 130, where he explains that *"reactions to asbestos are delayed, about 20 years in the case of asbestosis, up to 40 years for the malignant diseases"*. So the absence of any record of asbestos-related diseases arising from work in the dock yards reporting during the period before the end of the NDLB regime in 1967 would not have been regarded as of importance by an entity with medically qualified staff such as the NDLB with its specific statutory duties of care.
54. Finally, in deciding what warnings had to be given, it is necessary to bear in mind that:-
 - (a) *"the NDLB had a statutory duty to make satisfactory provision for the health of registered dock workers in so far as this did not exist apart from the scheme"*(paragraph 26 of the Court of Appeal judgment);
 - (b) the NDLB through its medical officers was involved in providing regular advice on a range of health and safety issues to the dock workers. This finding was stated in paragraph 58(a) of the 2006 judgment and it has not been challenged in this hearing. Indeed on further reflection at the

end of the present trial, I still considered the finding to be justified;

- (c) the NDLB through its local boards and through its medical staff knew first the claimants were coming into contact with asbestos powder and second that they were not being given any protective equipment by their employers to deal with the risks caused by them coming into contact with asbestos dust. These findings were stated in paragraph 58(c) of the 2006 judgment and they have not been challenged in this hearing. Again on further reflection at the end of the present trial, I still considered the finding to be justified with much asbestos dust escaping to the knowledge of the NDLB through its local boards;
- (d) in a document entitled "*Observations on the Port Medical Services of the [NDLB]*" dated 21 November 1955 and which was sent to the Chairman of the Committee of Inquiry into the Dock Labour Scheme by Dr. C H Hoskyn, who had been the Medical Officer for London to the NDLB from 1949 to 1952 and who had thereafter worked as a medical adviser to wharfingers and a shipping line, it was stated that: "...*The main functions of a port medical service can be summarised as follows ...4. a service for the investigation and control of special problems affecting the occupational health of workers in the port transport industry especially... (c) the investigation of dangers to health of the handling of contaminated or hazardous cargoes together with research into the provision and use of protective clothing*"; and
- (e) therefore the NDLB had the duty of taking steps to protect the claimants and other dock workers who worked in Liverpool Docks and that included the investigation of dangers to health caused by the handling of hazardous cargoes and research into the provision and the use of protective clothing. This required the NDLB which had medical and other staff to read and take account of publications which carried information about hazardous cargoes and the risks which they carried.

(v) *Information about the risks of contact with asbestos dust as in 1955*

55. As I have explained, Mr. Rice started working as a dock worker on 1955 and Mr. Cooksley contends that a warning should then have been issued to Mr. Rice at that time in the light of what was known about the dangers of asbestos. So it is necessary to ascertain what was known about the risks to health of contact with asbestos dust in 1955. A useful starting point is the article of Merewether and Price (who were respectively HM Medical Inspector of Factories and HM Engineering Inspector of Factories) in 1930 entitled "*Report on Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry*" and to which (as I have explained) Lord Bingham had also referred. The authors explained at paragraph 13 of the report that:-

“from the data so far obtained it seems clear that fibrosis of the lungs is a definite occupational risk among asbestos workers as a class. Furthermore it appears that the risk falls most heavily on those longest employed and on those engaged in the most dusty processes”.

56. Mr. Rice stated that while working in Liverpool Docks, he regularly came into contact with much asbestos dust when unloading cargoes of asbestos and indeed he was therefore engaged *“in the most dusty process”*. The report also states that one of the preventive measures which should be taken was *“the education of the individual, as in other dangerous trades, to a sane appreciation of the risk”*. This report was sent by HM Chief Inspector of Factories to the Home Secretary on 17 March 1930 with a letter stating that the report establishes :-
“the facts that the inhalation of asbestos dust over a period of years results in the development of a serious type of fibrosis of the lungs”.
57. In 1939, the Annual Report of the Chief Inspector of Factories for 1938 stated at page 63 (with my emphasis added) that:-
“one of the greatest problems facing industry today is that of dust... There can be no doubt that dust if inhaled is physiologically undesirable. It is not many years ago when the dust of asbestos was regarded as innocuous while today it is recognised as highly dangerous.”
- According to Mr. Clark it was also stated in that report that a link was being postulated between asbestosis and lung cancer.
58. Up to this point, the length of time for which a deceased worker had been exposed to asbestos before his death had not been specified but in the Annual Report of the Chief Inspectors of Factories for 1943, which was published in 1944, there was a report on the fatal cases of asbestosis which had followed exposure to asbestos for no more than six months. Thus there was then evidence from the Factory Inspectorate that contamination with asbestos dust could cause death within six months and this showed the lethal danger to dock workers like Mr. Rice who were then being exposed to asbestos dust. In the Annual Report of the Chief Inspectors of Factories for 1947, there was evidence that the incidence of lung cancer in association with asbestosis was more than 1 in 8 (13.2%). By then the NDLB had been set up.
59. In the Annual Report of the Chief Inspectors of Factories for 1949, the impact of the Asbestos Industry Regulations 1931 in factories where scheduled processes were undertaken was considered and it was stated according to Mr. Clark (with my emphasis added) that there was the need to:-
“.. keep an ever watchful eye for the new use of asbestos... on ships or buildings where the work may be undertaken by

someone not fully realising the necessity of preventing as far as possible the inhalation of asbestos fibres and dust”.

60. The report also drew attention to the risk to workers handling hessian bags containing asbestos fibre and the need for such workers to wear dust respirators when it stated at page 146 (with my emphasis added) that:-

“Several inspectors refer to the unsatisfactory practice of packing raw asbestos fibre into the unlined hessian or jute bags (frequently it is shipped at the country of origin and delivered to a factory in this manner) which renders workers handling them liable to a considerable exposure to dust and fibre... In handling packages which are not impermeable, the use of an approved type of respirator by all workers concerned is very important”.

61. A. As part of its duty of care and in particular its duty to investigate dangers to health to dock workers, the NDLB should have been reading the Annual Reports of HM Chief Inspectors of Factories especially when they referred expressly to the dangers to dock workers and the need for them to use protective measures. After all these reports were produced as a result of inspecting and monitoring a vast number of industrial premises and they contained carefully reasoned and thoughtful reports and recommendations. It is difficult to think of any more important publications for the NDLB to read as part of the duty of care which it owed to the claimants and not surprisingly, nothing was said during the trial to suggest that this is not correct. Furthermore, the defendant did not call any witness who had been involved with NDLB and so I have no idea if they considered this or any other material relating to the dangers of the claimants or of any dock workers inhaling asbestos dust.

B.I should mention that apparently one of HM Factory Inspectors sent a letter dated 13 July 1954 to Union Castle, which was a well-known ship owner and which was part of the same group as Clan Line, confirming his concern about the high concentration of asbestos dust in the hold of one of their ships in London Docks which came from asbestos loaded in hessian sacks and that the use of an approved dust respirator was “*strongly recommended*”. I have no idea if the NDLB saw this letter but even if it did not, it shows that by this time there was much evidence in the public domain about the serious dangers of dock workers inhaling asbestos dust and the need for dock workers to wear respirators.

62. A When Mr. Rice started his work as a dock worker in February 1955, the NDLB in the light of its statutory duty *might* well have been aware through its medical staff of the dangers of asbestos set out in the Annual Reports of the Chief Inspectors of Factories produced before it was set up and to which I have referred, namely the 1938 Report of the Chief Inspector of Factories which had warned that asbestos dust was “*highly dangerous*” while the 1943 Report of the Chief Inspector of Factories said that that asbestos dust could cause deaths within six months of contact with it and this showed the lethal danger of it.

B. Even if the NDLB had not been aware of these reports which had been published before it was set up, it ought after it was set up to have known through its medical staff that the Annual Report of the Chief Inspectors of Factories for 1947 published the very disturbing fact that the incidence of lung cancer in association with asbestosis was 13.2% according to one study. I stress that the duty of care owed by the NDLB would have required it to be alerted to dangers to dock workers set out in the Annual Report of the Chief Inspectors of Factories to which I referred in paragraphs 58 to 60 above and I have already explained the significance and standing of these Annual Reports in paragraph 61 B above. In my view, this information should have put the NDLB on notice of the dangers to dock workers like Mr. Rice of inhaling asbestos dust.

C. None of the evidence on which Mr. Kent relies in support of his contention that very limited warnings were needed had been published prior to 1955 and so they can be ignored at this stage. Furthermore as I have explained in paragraph 53, the gestation period for asbestos-related illnesses is so long that the fact that there were no dock workers suffering from any asbestos-related illnesses during this period is not of any real significance.

63. A. It is very significant that the Annual Report of HM Chief Inspector of Factories on Industrial Health for 1966 explained that by 1947 there was “*substantial and, to many, irrefutable evidence*” of the association between asbestosis and lung cancer. The NDLB with its duty of care to dock workers ought to have taken steps to acquaint itself with these reports. In the light of the fact that the NDLB knew first that Mr. Rice was coming into contact with asbestos dust and second that he was not receiving and had not received any warning, training or protection against asbestos dust, I consider that the NDLB with its specific duty of care in relation to the health of dock workers had an obligation to warn Mr. Rice and his fellow dock workers about the dangers of contact with asbestos dust which had been set out in those reports of the Chief Inspectors of Factories to which I have just referred including, but not limited to the fact, that there was “*substantial and, to many, irrefutable evidence*” of the association between asbestos and lung cancer and/or to provide him with respirators for the reasons set out, for example, in paragraph 60 above.

B. Those warnings would have been to the effect that first the Chief Inspector of Factories had warned that asbestos dust was “*highly dangerous*” and that asbestos dust could cause deaths within six months of contact with it and second that this showed the lethal danger of it, which was demonstrated by the fact that the incidence of lung cancer in association with asbestosis was 13.2% according to one study. I am fortified in reaching that conclusion by applying the established principle that in determining the standard of care required of somebody on whom the duty of care is imposed, a court has to have regard to the probability of harm caused as a result of the breach of duty and also the probable seriousness of the harm which might be caused (see for example **Halsbury’s Laws of England** – Fourth Edition (Reissue) volume 33 paragraph 622). For the purpose of completeness, I add that no such warning or any warning was given and no cogent reason has been put forward to explain this serious omission.

(vi) *Information about the risks of contact with asbestos dust as in 1960*

64. The dangers caused by the escape of asbestos dust from hessian bags was stressed in the Annual Report of the Factory Inspectors for 1956, which contained a comprehensive review of the Asbestos Industry Regulations 1931 reminding employers first of the *“toxic nature of the dust”* (page 141) and second of the precautions which had to be taken to prevent the formation and spread of asbestos dust. It drew attention to the hazards associated with asbestos beyond traditional asbestos factories. It also referred to the problems associated with the escape of asbestos dust from hessian bags for those handling imported asbestos and this group would have obviously included Mr. Rice. The report stated at pages 143 to 144 that:-

“Most asbestos received from abroad is in hessian sacks, which do not retain the dust. They are also often torn, and the consequent spillage results in dust entering the air of the workroom. Many occupiers tried to get deliveries in impermeable bags, but so far they have not been successful. The suppliers claim that the paper sacks are likely to be broken in shipping, but judging by the experience of the shipping of cement there does not seem to be much foundation for this objection. Factories which obtain prepared fibre from works in this country can usually obtain it in bituminized paper sacks”.

65. This report would have provided the NDLB with further information about the circumstances in which Mr. Rice would have come into contact with asbestos dust. The NDLB ought to have read this report as part of its statutory duty and the duty of care which it owed to Mr. Rice. In May 1958 after much discussion, a panel of experts (which included representatives of the Transport and General Workers Union, of the ship owners and of HM Inspectors of Factories) set up under the auspices of the International Labour Office published a code of practice entitled *“Safety and health in dock work”*. The code provided that where dock workers were *“exposed to dangerous or irritant concentrations of dust suitable respiratory protective equipment should be supplied and worn”* (paragraph 580(2)). I do not know if the NDLB had acquainted itself with this code but it should have done as according to May LJ in the Court of Appeal (paragraph 26), the NDLB had:-

“a statutory duty to make satisfactory provision for the health of registered dock workers in so far as this did not exist apart from the Scheme”.

66. The need for respirators to be provided where dock workers were coming into contact with toxic substances of which asbestos dust was an example was stressed again when in March 1960, HM Factory Inspectorate published Booklet 8 entitled *“Toxic substances in factory atmospheres”* in which it was stated at page 5 that:-

“..there are a very few cases where toxic dust or fume is generated and cannot be adequately controlled by any of the methods referred to in the previous sections. In such circumstances, appropriate respirators or other types of breathing apparatus should be provided and worn. The Chief Inspector of Factories gives approval for particular

industrial purposes to respirators which have passed tests designed to ensure a high standard of performance”.

67. A. Although this booklet was dealing with factories, the NDLB ought to have been reading and considering this document as part of its statutory and common law duties especially as the NDLB had been put on notice of the dangers of dock workers inhaling asbestos dust from the earlier reports to which I have already referred.. By this time, the NDLB ought to have become deeply and increasingly concerned about these dangers and among other things it ought to have been keeping a look out for other articles which might provide more information and obviously the medical press would have been an obvious place to look for such information.
- B. In 1960, an influential paper was published by Wagner and others in the British Journal of Industrial Medicine entitled “*Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province*”, which included eight case studies of those who suffered from mesothelioma of which two showed that only a *short* exposure to asbestos could cause injuries. At page 269, the authors stated (with my underlining added) of mesothelioma that:-
- “The pathological evidence of associating these tumours with asbestos exposure is not conclusive... these findings tend to add support to asbestos being the common factor in the development of these tumours, and to counter the suggestion that there may be some environmental cause in the region of Griqualand West”.*
68. In the case of **Walker v Port of London Authority** (supra), Tucker J pointed out that a witness in that trial had explained that it came as a bolt out of the blue to discover that “*this terrible disease came from a very short or transient exposure*” (page 16A). I have come to the conclusion that by 1960 there was clear and strong evidence of the deeply disturbing fact that short exposure to asbestos dust could cause mesothelioma .
69. A. In my view, any reasonable entity which had the statutory duties and the duties of care which were imposed on the NDLB and which had medical staff as the NDLB had would by 1960 have appreciated not only the matters of which it should have been aware in 1955 but also after publication of the Wagner article that that short exposure to asbestos dust could cause mesothelioma. As I have explained, the Annual Reports of HM Chief Inspectors of Factories should have put the NDLB on notice of the potential danger to dock workers of inhaling asbestos dust without the use of respirators and it should have been looking out for further information about this and the Wagner article was obviously very important, well- researched and it created a stir
- B. The dangers of suffering from mesothelioma after a short exposure to asbestos dust highlighted in Wagner’s article should have been incorporated in the warnings, which ought to have been given to Mr. Rice and who ought to have been warned to use respirators. Again, I am fortified in reaching that conclusion

by applying the established principle that in determining the standard of care required of somebody on whom the duty of care is imposed, a court has to have regard to the probability of harm caused as a result of the breach of duty and also the probable seriousness of the harm which might be caused (see for example **Halsbury's Laws of England** – Fourth Edition (Reissue) volume 33 paragraph 622). It follows that I have concluded that the very limited warnings advocated by Mr. Kent were, and would have been, totally inadequate in the light of the risk to the claimants from very short or from transient exposure of mesothelioma.

70. A. For the purpose of completeness, I should add that none of the publications on which Mr. Kent relies to support his very limited warning and to which I refer in paragraphs 85 to 87 and paragraphs 92 to 105 below had been published by 1960. In concluding that these warnings had to be given, I have not overlooked the contention of Mr. Kent that such warnings need not have been given because there was no evidence of a single case of asbestos-related disease arising from work in the dock yards reported during the life of the NDLB regime but as I have explained in paragraph 53, it is and has at all relevant times been well established that adverse reactions to asbestos dust are delayed for long periods. So the lack of evidence of a single case of asbestos-related disease arising from work in the dock yards does not affect my conclusion relating to the warnings which should have been given.

B. I should add that after I circulated the draft of this judgment to counsel Mr. Kent raised in a letter to me the point that “*the Factory Inspectorate and Ministry of Labour did not, on the evidence, take action in respect of transient exposure and mesothelioma until some time later (when the Senior Medical Inspectors’ Advisory panel (referred to in paragraph 92) was set up*” . In my view, the NDLB’s statutory duty was not merely to await recommendations from the Factory Inspectorate and Ministry of Labour but it had its own medical staff and its own special statutory duties and duties of care which would have required it to warn the dock workers. In any event, Mr. Kent’s point fails to take account of the previous reports of the Factory Inspectorate to which I have referred and which explain the dangers to dock workers of inhaling asbestos dust and the importance of using respirators. I stress that the NDLB should in any event have been put on notice of the dangers of asbestos dust from the report of the Factory Inspectors and this should have led them to look out for relevant articles of which that by Wagner was a prime example.

(vii) *Information about the risks of contact with asbestos dust as in 1964*

71. Mr. Rice started his second period of work as a dock worker in early 1964 and it is appropriate now to consider (if I am wrong and the NDLB did not have any obligation to take the steps in 1955 or in 1960 which I set out in paragraphs 63 and 69 to warn or train the claimants about the risks of contact with asbestos) whether in early 1964 the NDLB in performing its duty of care to the claimants had any obligation to train or warn the claimant about those risks.
72. After 1960, there has been further and repeated reference in the medical literature to the fact that *very brief* exposure to asbestos dust could cause tumours and this provides added support for my conclusions regarding the need for a warning to be given to the claimant about the risk of transient exposure to asbestos dust to which

I have referred in paragraphs 63 and 70 above. Indeed by 1962, Wagner's paper, to which I have referred in paragraph 67 above, had prompted researchers to look at the connection between exposure to asbestos dust and mesothelioma.

73. Thus in a letter written by Mr. WJ Smither (who was Chairman of the Asbestos Research Council) and two members of the Medical Research Council Messers J.C. Gilson and J.C. Wagner and which was published in the British Medical Journal on 3 November 1962 on "*Mesothelioma and Asbestos Dust*". The letter stated (with my emphasis added) that:-

"There appears to be no correlation between the severity of any pulmonary asbestosis and the occurrence of pleural and peritoneal tumours. In a number of cases the exposure to asbestos dust appears to have been minimal, and the only histological evidence of asbestos exposure is the presence of a few asbestos bodies and fibres in the lung tissues".

74. As I have already explained, the NDLB as part of its statutory duty of care and its common law duty of care was obliged to look out for and monitor publications relating to dangers to Mr. Rice and this included the risks of inhaling asbestos dust especially in the light of the previous Annual Report of HM Chief Inspector of Factories and the Wagner article. Further the Annual Report of HM Chief Inspector of Factories for 1966 had explained first that by 1947 there was "*substantial and, to many, irrefutable evidence*" of the association between asbestosis and lung cancer and second that by 1964 this association was "*beyond doubt*". In my view, the case for requiring the NDLB in performance of its duties of care to warn and train Mr. Rice about the dangers of contact with asbestos dust (including the effect of the association between asbestosis and lung cancer being shown "*beyond doubt*") and/or to warn him to use respirators had become much stronger in the light of the material set out in the last paragraph and again in the absence of any contradictory material. Again, I am fortified in reaching that conclusion by applying the established principle that in determining the standard of care required of somebody on whom the duty of care is imposed, a court has to have regard to the probability of harm caused as a result of the breach of duty and also the probable seriousness of the harm which might be caused (see for example **Halsbury's Laws of England** – Fourth Edition (Reissue) volume 33 paragraph 622).

(viii) *Information about the risks of contact with asbestos dust as in July/August 1966*

75. Mr. Thompson started as a dock worker in July 1966 and there was growing evidence of the dangers of minimal contact with asbestos causing a fatal tumour. On 25 July 1964, after the publication of various papers in the British Medical Journal, a leading article entitled "*Asbestos and Malignancy*" reviewed the association between asbestos and malignancy in which it was stated (with my emphasis added) at page 203 that:-

"There appears to be no correlation between the degree of severity of any asbestosis and the occurrence of pleural or peritoneal tumours and in some cases the exposure to

asbestos dust seems to have been slight... Until we know the answers to some of the questions posed by the recent findings all exposures to asbestos dust should be considered hazardous and supervision should be extended to insulation workers in ships, factories and domestic buildings who may be intermittently but nevertheless heavily exposed to asbestos dust".

76. Although this article referred to “*insulation workers in ships*”, it was of importance to all entities which had responsibilities for people with exposure to asbestos dust and that would have included the NDLB because of its duties to protect the health of the claimants and other dock workers as I explained in paragraph 54 above. This article repeated the dangers of even “slight” exposure to asbestos dust and also that “all exposure to asbestos dust should be considered dangerous”. This point was made again in 1964 when Dr. C.I. Leathart’s article was published in the Journal for Industrial Nurses entitled “*Asbestos-A Medical Hazard of the 20TH Century*”. It stated in the introduction (with my emphasis added) that:-

“It is now quite clear that asbestos did not limit its effects to those who handle it in the industry but produces disease in many people who have had only a passing contact with it. One of these... is a fatal tumour”.

The final page of the article contained the conclusion that:-

“wherever asbestos is used steps should be taken to prevent dust entering the workers’ lungs’.

77. I have already explained why the NDLB as part of its statutory duty of care and its common law duty of care was obliged to look out for and monitor publications relating to dangers to Mr. Rice and this included the risks of inhaling asbestos dust especially in the light of the previous Annual Report of HM Chief Inspector of Factories and the articles to which I have already referred. So by the end of 1964, it must have been very clear to any entity interested in the welfare of dock workers (such as the NDLB) that there was powerful evidence from different sources stating that minimal exposure to asbestos dust could lead to fatal tumours and mesothelioma and also that the appropriate protection against dock workers being exposed to asbestos dust was to provide them with one of the approved respirators, which they should have been required to wear when they were at risk of coming into contact with asbestos dust. Again the NDLB with its statutory duties ought to have been fully aware of these risks of minimal contact with asbestos dust and the need to continue to warn the claimants and other dock workers about them.

78. In 1965, the Annual Report of the Factory Inspectors for 1964 was published and it stated at page 38 (again with my emphasis added) that:

“Interest in the problems arising from exposure to asbestos increased in the Inspectorate and generally during 1964.

In particular, the growing evidence of an association between asbestosis and pulmonary cancer and, apparently between exposure to asbestos and the occurrence of the relatively rare tumour known as a mesothelioma, which may occur in either pleura or peritoneum, has received attention".

79. On page 39 of this report it was stated that "*The latest data suggest that there is a considerable risk of men and women with asbestosis dying from a lung cancer*". This constituted further evidence of the dangers of exposure to asbestos dust in respect of which the NDLB would have been obliged in performance of its duty of care to give warnings to Mr. Rice.
80. In an article in the British Journal of Industrial Medicine published in November 1965, Newhouse and Thompson repeated data and conclusions which had been presented at a meeting in New York in the previous year and which confirmed the occurrence of mesothelioma in persons who were only *slightly* exposed to asbestos fibres in non-occupational situations. It referred at page 264 to the death of a docker's wife whose husband returned home "*white with asbestos*" for three or four years whereupon she brushed him down. In the **Walker** case, Tucker J explained that according to a witness, "*this paper more than any other alerted the popular press and caused great concern*" (page 16E of the transcript). The NDLB as part of its statutory duty of care and its common law duty of care was obliged to look out for and monitor publications relating to dangers to Mr. Rice and this included the risks of inhaling asbestos dust especially in the light of the previous Annual Report of HM Chief Inspector of Factories and the articles. Regrettably and very surprisingly the NDLB continued to refrain from giving warnings to Mr. Rice for reasons which have not been disclosed in the evidence in this case. This was a further breach of its duty of care.
81. The case of the docker's wife appeared on the front page of the "Sunday Times" in October 1965. Sadly apparently, the NDLB was not alerted and it did not show any concern. By then there was an even stronger case for the NDLB giving warnings to the claimants than had been the position in 1964 which I explained in paragraph 74 for the NDLB to have been required in discharge of its duty of care first to warn dockworkers about the risks that even transient contact with asbestos dust could cause mesothelioma and pulmonary cancer, second to train them about the risks of such contact and/or third to advise them to use respirators. Again, I am fortified in reaching that conclusion by applying the established principle that in determining the standard of care required of somebody on whom the duty of care is imposed, a court has to have regard to the probability of harm caused as a result of the breach of duty and also the probable seriousness of the harm which might be caused (see for example **Halsbury's Laws of England** – Fourth Edition (Reissue) volume 33 paragraph 622). In reaching that conclusion, I have not overlooked three matters on which Mr. Kent relies very strongly but which on closer examination do not undermine this need for the warnings, for training and for the use of respirators.

82. First, on 8 June 1966, Her Majesty's Factory Inspectorate sent letters to shippers explaining that (with my emphasis again added) there was "*virtually no risk in handling asbestos in normal dock operations provided that the commodity is packed in impervious bags*" which the letter described as such as "*hessian with a sealed inner polythene linings*". It is not known if the NDLB received this letter from which the inference would have been drawn by any reasonable entity that there was a danger to dockworkers from handling asbestos which was *not* packed in impervious bags such as hessian with a sealed inner polythene lining.
83. Second, there was a report produced by Dr. Milton and dated 18 August 1966 in which he comments on an inspection carried out at London Docks as a result of problems caused by the discharge of asbestos in which it was stated very surprisingly in the light of later developments that although the risk to dock workers from exposure to asbestos was "*minimal*", respirators could not be recommended except for handling either loose asbestos in unlined hessian bags or cargoes where there has been abnormal quantities of dust.
84. The heading of the report states that Dr. Milton was an "*analytical and consulting bio-chemist*" and his degrees show that he was not a medical doctor. So anybody reading the report would realise that it was not based on medical experience or research and accordingly Dr. Milton's report was dealing with different matters from the almost unanimous and repeated assertions and warnings from doctors and the Chief Factory Inspectors of the dangers of contact by dockworkers and others with asbestos dust without any protection being used.
85. The third matter relied on by the defendant is the advice contained in a letter of 27 October 1965 from Mr A. P. Hatfull a civil servant at the Ministry of Labour which significantly was apparently not sent to the NDLB. This letter explains that:-
- a. The Factory Inspectorate "*do not disagree*" with recommendations that "*men working in the hold and in the barges needed to wear a mask in order to protect them from the asbestos dust*" as "*such precautions are probably necessary in the conditions which were found in the ship in question as asbestos was being unloaded in unsealed hessian sacks*". The inference from that advice was that asbestos dust was a health hazard for dock workers such as the claimants even though "*the Factory Inspectorate knows, however, of no case of asbestosis attributable to employment in the docks unloading asbestos*";
 - b. Masks are unnecessary where packaging other than unsealed hessian bags were used. The clear inference is that masks were unnecessary where the asbestos was in suitably sealed or impervious sacks because the letter also stated that "*the risk of a docker developing clinically recognisable asbestosis is slight provided impervious sacks are used*";
 - c. The inference was that unsealed hessian bags were still being used because the letter stated that when it was written in October 1965 that "*discussions are proposed with importers of asbestos on the elimination of unsealed hessian bags and*

the ultimate possibility of palletting as an alternative means of handling”;

- d. *“in the last year or so there has been much publicity attached to a rare form of tumour known as mesothelioma. This appears to be commoner in those exposed to asbestos. The problem is at present under urgent review by an advisory Panel set up by the Senior Medical Inspector of Factories. The risk is certainly no greater in dockers than in other workers exposed to asbestos”;* and
- e. Dr. Hunter of the Institute of Clinical Research at Middlesex Hospital and his deputy were given copies of the letter and *“agree, in general with its contents”.*

86. The letter did not state that there was no risk or even that there was only a slight risk when there was an escape of asbestos dust. It is noteworthy as I explained in paragraph 85 (b) above, the letter states that the risk of a dock worker developing asbestosis was only “*slight*”, but that was only when “*impervious sacks are used*” or in other words when there was only an extremely limited risk of any of the asbestos dust escaping. The inference is that where there was an escape of asbestos dust, the risk to the dock worker who came in contact with the dust was more than being “*slight*”. The letter did not state that there was no risk of mesothelioma from contact by dock workers with asbestos dust.

(ix) Information about the risks of contact with asbestos dust after July/August 1966 and until the end of the NDLB regime in 1967

87. During this period there was continuing concern about the dangers of contact with asbestos dust. In May 1967, Her Majesty’s Factory Inspectors circulated a preliminary draft of the revised Asbestos Regulations which in its covering letter made clear that the handling of asbestos at the docks was to be dealt with in revised Docks Regulations which were to be issued shortly.
88. In August 1967, a draft of the Dock Regulations was duly issued which imposed restrictions on loading, unloading or handling asbestos:-

“unless it is securely packaged in impermeable bags or containers and mechanical means are used for the loading, unloading or handling so as to reduce the risk to persons employed from asbestos dust”.

89. There were also requirements that:-
- “all practical means shall be provided and used to prevent those persons [involved in loading, unloading or handling] inhaling asbestos dust”.*
90. Finally, the Annual Report of the Factory Inspectors for 1966 published in August 1967 pointed out that studies were proceeding into the association of forms of asbestos with mesothelioma and it concluded that:-

“while such studies are proceeding, the only safe course is to eliminate the escape of asbestos into the air”.

91. Mr Kent contends that in the light of the contemporaneous literature there was *“little evidence of the dose required beyond a general indication that a modest exposure might also lead to a person suffering from mesothelioma”* and he relies on a number of matters.
92. First, he attaches importance to the report of the Senior Medical Inspectors’ Advisory Panel reporting to Her Majesty’s Factory Inspectors and the Ministry of Labour at the end of 1967. Mr. Kent contends that this focused on the risk from blue asbestos and he submits that it is significant that the document does not discuss the possibility that transitory exposure to white asbestos might be implicated in the development of mesothelioma. Mr. Kent’s submission is that the implication of the report is that as long as blue asbestos is not encountered, the identifiable risk remains asbestosis and the associated risk of lung cancer arising out of heavy exposure.
93. It is true that the report states deals with blue asbestos (crocidolite) and it states that:-
- “40. At a meeting following the Symposium in Biological Effects of Asbestos in New York in 1964, the Working Group on Asbestos and Cancer of the International Union against Cancer expressed its views on this extremely difficult problem in these words: “In the case of mesotheliomas evidence from certain countries suggests that exposure to crocidolite may be of particular importance but it cannot be concluded that only this type of fibre is concerned with these tumours and further investigations of this problem is needed” (25)*
- 41. These words aptly sum up our own views on the aetiology of mesotheliomas. However, we feel we must go a bit further and pose the questions “Can we in the light of the existing evidence incriminating crocidolite afford to wait, perhaps for several more years, until pure population studies give a final answer to this problem?” This we appreciate is not solely a medical question, but we feel it is within our competence to recommend that, unless special considerations operate, crocidolite should wherever possible be placed by another variety of asbestos and whatever measures may be adopted to control asbestos dust, these must be even more rigidly applied to crocidolite.”*
94. I am unable to agree insofar as it is suggested that the article states either that there was not a risk of mesothelioma or of any other serious illness from non-blue asbestos or that substantial contact with white asbestos dust was required before a dock worker would suffer from any asbestos-related illness. What is also significant is that the report was only published in January 1968 which was after

the NDLB had been wound up although it does show what some influential doctors thought about the dangers of some forms of asbestos. Of course, it must not be forgotten that the defendant did make the concessions which I set out in paragraphs 6 and 7 above and which sets out some of the dangers of contact with asbestos dust. In any event, there was by this time a large amount of carefully reasoned and cogent evidence which I have summarised and which shows the dangers of transient contact with asbestos dust and which, as I have explained, should have led to warnings being given to dock workers such as the claimants about the dangers of transient exposure to asbestos dust well before and in Mr. Rice's case many years before the publication of the report of the Senior Medical Inspectors' Advisory Panel on which Mr. Kent relies.

95. In any event, this report of the Senior Medical Inspectors' Advisory Panel reporting to Her Majesty's Factory Inspectors and the Ministry of Labour on which Mr. Kent relies has to be considered in the light of other very significant earlier findings about the dangers of contact with asbestos. For example, the Annual Report of HM Chief Inspector of Factories on Industrial Health for 1966 which explained that by 1947 there was "*substantial and, to many, irrefutable evidence*" of the association between asbestosis and lung cancer. The report added that by 1964 this association was "*beyond doubt*". The failure of the NDLB to give any warning to the claimants is both surprising and disturbing as there was clear evidence that the dock employers were not taking any steps to eliminate the exposure of dock workers to asbestos dust or to provide the dock workers with respirators or any warnings of the danger of asbestos.
96. Indeed such an entity as NDLB would have realised from the literature, from which I have quoted, that there was a serious risk from brief exposure to asbestos dust. I stress that Mr. Kent has not sought to challenge the correctness or the significance of the material which I have described and which show that transient contact with asbestos dust could lead to a dock worker suffering from asbestosis, tumour or mesothelioma.
97. As I have explained, there was widespread escape of asbestos dust during all the time when the claimants were working in Liverpool docks with the result that they were frequently covered with asbestos dust during the time when the NDLB regime was in force. So the NDLB should have known of the risk of this fact in the light of the concessions which I set out in paragraphs 6 and 7 above and what was described in paragraph 20 of the Court of Appeal judgment as the statutory duty of the NDLB to "*make satisfactory provision for the health of the registered dock workers so far as it did not exist apart from the scheme*". I have already explained that no provision was made by dock employers for the health of the dock workers in unloading asbestos. Therefore the entire responsibility for warning the dock workers fell on the shoulders of the NDLB who with their medical staff must have been or ought to have been aware of the dangers to the health of the claimants in the light of all the medical material to which I have referred and which was in the public domain. With their statutory duty the NDLB should have been monitoring the material in the medical press which might be relevant to the health of the dock workers such as the claimants.
98. Next Mr. Kent seeks to derive assistance from the joint report entitled "*Inquiry and Conclusions on the Medical Aspects of Working Cargoes of Asbestos by*

Dockers of the Port of London” which is said to be dated 14 April 1967 and which was signed by Dr Kenneth Perry of The London Hospital, Dr. Robert Murray who was the Medical Advisor to the Trade Union Congress and Dr. A. M. Lawrence-Smith, who was the Port of London Authority’s Principal Medical Officer.

99. They reported that:-

- a. No injury to a Port of London dock worker’s health could have resulted from “*employment there with asbestos cargoes*” and that they did not know of any cases of asbestosis occurring among dock workers elsewhere in “*this country arising as a result of dock work*”;
- b. They had examined the method of packing used by shippers and that had inspected the methods of stowage in ships as well as the procedures in the Port of London for handling asbestos cargoes and “*we are satisfied that with asbestos packaged according to the requirements explained to us, namely in impervious lined bags, the future risk should be negligible and no special protective measures should be needed in the Docks*”;
- c. “*In the event of sub-standard packaging being met with among the cargoes received we would recommend that the rate of discharge should be controlled by local agreement more particularly if bursting of bags occurs. Respiratory protection would then be advisable during clearing-up operations, using approved respirators*” (my underlining added). It is noteworthy that the local agreement referred to in the report is not described;
- d. “*We are fully satisfied, so far as the Docks Industry is concerned, that no unacceptable risk at present exists and that provided the currently approved requirements and methods of work are followed. Dockers may proceed with confidence in the handling of asbestos cargoes*” (my underlining added). It would seem that the “*currently approved requirements and methods of work*” would mean that the asbestos was in impervious lined bags for the reason set out in sub-paragraph (b) above; and
- e. There was a “*need for continuing vigilance to ensure the exclusion of developing hazards and for this purpose we recommend the regular inspection of cargoes of asbestos together with the proper supervision of the health of Docks staff*”. One signatory (Dr. Robert Murray) added that the continuing vigilance included “*regular environmental monitoring of the unloading operation and appropriate medical examination of dockers with long service including exposure to asbestos cargoes*”. This indicated some concern that asbestosis-connected illnesses had a long period of gestation.

100. I do not consider for the following reasons that the defendant can obtain much support from this document which is based on the assumption that the asbestos was packed in impervious lined bags as appears in paragraph 99 (b) above and which as I have explained was not an accurate assumption.
101. First, the fact that the use of respirators was regarded as “*advisable*” during cleaning-up operations shows clearly that the writers of the report realised that contact by dock workers with asbestos dust was harmful as otherwise there would have been no need to use respirators. Second, the report is based on the clear assumption that *any* contact with asbestos dust could damage the dockworker’s health as the use of respirators was recommended for any cleaning-up of asbestos dust irrespective of how little asbestos dust was involved.
102. Third, the report did not consider the position in Liverpool Docks where the claimants were working and which, as I have explained, had a number of seriously disturbing factors such as first that there were very many bags of asbestos which had burst while they were in the hold; second that there was much loose asbestos dust in the hold; third that there was a danger of other bags bursting in the unloading process perhaps by hitting the side of the ship or by the use of the scratcher; and fourth that the dock workers were being covered with asbestos dust.
103. Finally, if the writers of the report had observed the conditions prevailing in Liverpool when the claimants were working there while the NDLB regime was in force, they would have witnessed large quantities of asbestos dust regularly escaping and then they would surely have produced a different report because they would then in those circumstances have had to consider the effect on the dock workers of inhaling these large escapes of asbestos dust. The report implies that the writers of it would have required a local agreement and the supply of respirators for those who came into contact with the asbestos dust because the claimants would have to have been placed in the same position as those who had to clear up the asbestos and for whom those precautions were required as I have explained in paragraph 99(c) above.
104. In any event, this report was produced too late to be relevant to the NDLB’s duties to warn as it was published after the time when both Mr. Cooksley and Mr. Kent agree that the claimants should have been warned of the risks of asbestos dust. The report is however of value and of relevance to the present claims as it shows what was understood about the dangers for dock workers such as the claimants of contact with asbestos dust without the use of respirators.
105. Finally Mr. Kent relies on the answer to a parliamentary question given by the Minister of Labour (Mr Ray Gunter MP) to the House of Commons on 17 April 1967. The comments of Mr Gunter about the safety of handling asbestos in docks were based on assumptions that imported asbestos would be packaged in impermeable bags or dust proof containers in which case the dockers are “*at no greater risk than the rest of the population*” but as I have explained in paragraphs 23 to 34 above the conditions prevailing in Liverpool were different with much asbestos dust escaping and being inhaled by dock workers such as the claimants.

106. To my mind, the clear inference to be drawn from Mr. Gunter's statement was that if there was an escape of asbestos dust, then steps had to be taken to protect the dock workers who came into contact with the asbestos dust. In any event, there is nothing in the statement which shows (as Mr. Kent contends to be the position) that there had to be contact with *large* quantities of asbestos dust before the health of a dock worker was endangered and that inhalation or contact with lesser quantities was free of risk for the claimants. This is important as the warnings advocated by Mr. Kent are based on the assumption that the danger to dock workers only arises in the event of contact with "*large*" quantities of asbestos dust. Finally, this statement was made too late to be relevant to the NDLB's duties to warn as it was published after the time when both Mr. Cooksley and Mr. Kent agree that the claimants should have been warned of the risks of inhaling asbestos dust. The stark fact is that the warnings should have been issued by the NDLB many years earlier.
107. I have concluded that during the period from the start of Mr. Thompson's employment until the end of the NDLB regime, the NDLB had an obligation in discharge of its duty of care, first to warn the claimants about the risks of even transient contact with asbestos dust could cause mesothelioma and pulmonary cancer, second to train them about the risks of such contact and/or third to advise them to use respirators when they came into contact with asbestos dust.
108. My conclusions that warnings should have been given by the NDLB to the claimants at the times to which I have referred, are underpinned by the established principle, that in determining the standard of care required of somebody, on whom the duty of care is imposed, a court has to have regard to the probability of harm caused as a result of the breach of duty and also the probable seriousness of the harm which might be caused (see for example **Halsbury's Laws of England** – Fourth Edition (Reissue) volume 33 paragraph 622). Applying that principle in this case, the position was that a failure by the NDLB to warn the claimants about the dangers of even minimal contact with asbestos dust would have led – and did sadly lead - to the serious prospect of very serious illness and in Mr. Rice's case his death. A further reason why warnings of the kind advocated by the claimants should have been given was that they were easy to draft and to circulate, whether by putting up public notice, or by placing documents containing the warning in the claimants' pay packets.
- (x) *The warnings advocated by the defendant*
109. I have concluded that the warnings suggested by Mr. Kent do not go far enough as: first they do not warn of the dangers of *transient* contact with small quantities of asbestos dust which the medical evidence showed could cause asbestosis, mesothelioma and lung cancer; second they implied that it was only contact with "*large quantities of asbestos dust*", which was a source of danger; and third the defendant's suggested warnings do not deal with the risk of mesothelioma. As I have explained, the dangers of transient contact with asbestos were clearly shown in the medical literature such as the articles by Wagner and others, the letter written by Smither and others, the leading article in the British Medical Journal and Dr. Leathart's article to which I have already referred.
110. I must add that, as I will explain in paragraphs 149 and 150 below, if I am wrong and Mr. Kent was correct in his contention that the only warnings which were

required of the NDLB were those set out in paragraphs 44 and 45 above and which related to contact only with “*large quantities of asbestos dust*”, then my conclusion is that the failure of the NDLB to give even those warnings has materially increased the risk of both claimants suffering from the illnesses from which they have suffered.

(xi) *What training should have been given to the claimants?*

111. The NDLB had obligations to train dock workers and this training should have included explaining the dangers of contact with asbestos dust and giving the advice which I have specified. In other words, the obligation on the NDLB to give these warning about those dangers went hand-in-hand with the need to give training to claimants to the same effect. So the NDLB should have been giving training to the claimants in accordance with the warnings which I have concluded should have been given.

(xii) *Supplying respirators*

112. As I have explained, Mr Cooksley contends that the NDLB should have requested the dock employers to provide respirators for the claimants in performance of the duty of care owed by those employers to the claimants. Mr. Kent accepts first that respirators have been available since before the Second World War and second that in the late 1950s and the early 1960s, a number of approved respirators were available which Mr Clark described and details of which he said would have been available from the local offices of HM Factory Inspectorate. In addition, Mr. Kent does not challenge the proposition that if the respirators had been used constantly and whenever there was to be contact between the claimants and asbestos dust, their use would have constituted an effective method of preventing exposure of the claimants to the asbestos dust. Indeed if Mr. Kent had not accepted each of these propositions, I would have found each of them fully justified on the evidence.

113. I consider that the NDLB apart from advising the claimants to wear respirators should in the performance of its duty of care have also requested the dock employers to provide respirators for the claimants. It is noteworthy that the use of respirators was recommended in situations where workers would come into contact with “*toxic substances*” by the HM Factory Inspectors in their booklet published in March 1960 to which I referred in paragraph 66 above and of course by then asbestos dust had been deemed toxic. This repeated the statement to which I referred in paragraph 60 above in the 1949 report of the Chief Inspector of Factories for 1949 that “*the use of an approved type of respirator by all workers concerned is very important*”.

114. In addition, as I pointed out in paragraph 99 above, the joint report entitled “*Inquiry and Conclusions on the Medical Aspects of Working Cargoes of Asbestos by Dockers of the Port of London*” (which is said to be dated 14 April 1967 and which is signed by Dr Kenneth Perry of The London Hospital, Dr. Robert Murray, who was the Medical Advisor to the Trade Union Congress, and Dr. A. M. Lawrence-Smith, who was the Port of London Authority’s Principal Medical Officer) stated that “*respiratory protection would then be advisable during clearing-up operations using approved respirators*”. In other words,

respirators were required even in the case of transient contact by a dock worker with asbestos dust.

115. The claimant's case is that the recommendation to supply respirators should have been made in the first place to dock employers but that if the NDLB could not persuade the employers to supply respirators, then the NDLB should itself have provided the claimants with them. It is clear that there were approved respirators which could be obtained through a recommended local retailer and then the NDLB could have been reimbursed by the dock workers with the cost of the respirators by weekly instalments.
116. In support of this contention, it was pointed out by Mr. Cooksley that Professor Turnbull had explained that the NDLB had provided dock workers with protective boots, gloves and goggles and that the NDLB had then been reimbursed by deductions from the wages of the dock workers. Professor Whiteside was reluctant to agree that respirators could be provided through or by the NDLB although she failed to put forward any cogent reason why she took that line.
117. So I conclude that the NDLB in performing its duty of care ought to have requested the dock employers to supply respirators and if they did not do so, then the NDLB ought itself to have supplied the respirators to the dock workers and than been reimbursed by the dock workers by retaining part of their wages. I will return to consider whether the claimants would have worn them or have been allowed by their shipper employers to wear them as their use would have delayed the unloading process.

(xiii) Not disciplining dock workers for refusing to unload asbestos in unsafe conditions and without sufficient safety measures.

118. If the claimants and other dockworkers had been warned in the way I have explained of the dangers of even transient contact with asbestos dust without using respirators, the position which now has to be considered is what would have happened if the dock employers had required either claimant or any dock worker to come into contact with the asbestos dust without being provided with respirators and the dock worker then refused to comply with the instruction from the dock employer because of the dangers of contact with asbestos dust.
119. As I explained in paragraphs 48 and 49 of the 2006 judgment, any dock worker who refused to comply with an instruction from a dock employer would be subject to disciplinary procedures of the NDLB regime which included the power of the NDLB to prevent the dock worker remaining within the NDLB scheme. The consequences of such a step would have been very serious because if the NDLB had exercised this power, this would have led to the consequent and inevitable loss of the dock worker's livelihood as loss of registration would have prevented a dock worker from working in the docks. Of course, if the dock workers could be disciplined by the NDLB in this way or even if there was a threat of such disciplinary action, it would have seriously undermined the value of giving any warnings to the dock worker about the dangers of coming into contact with asbestos dust. In other words, if the claimant or any dock worker could not follow the advice given by the NDLB about the dangers of contact with asbestos dust

without a respirator without running the risk of being dismissed or disciplined, then the claimant or any dock worker would have been unable to act on the warning and the value of it would thereby have been nullified.

120. I agree with Mr. Cooksley that this cannot be right and indeed that as part of its duty of care, the NDLB should have told registered dock employers and dock workers that the dock workers would not be disciplined for refusing to unload asbestos when they might come into contact with asbestos dust without being able to use respirators. In my view, there would have been no point in warning the dock workers about the dangers of transient contact with asbestos dust, without ensuring that they would not be punished if they acted upon those warnings by refusing to handle asbestos, when they might come into contact with asbestos dust without having adequate safety precautions in the form of respirators. The same reasoning would apply if the NDLB was only obliged to give the limited warnings which Mr. Kent submits were appropriate and which I set out in paragraphs 44 and 45 above.
121. In reaching this conclusion, I have not overlooked the defendant's contention that the duty of care could not be based upon "a refusal to do that which the statutory scheme required, namely to discipline dockers who refused allocation". This is not what the NDLB scheme states because, as I explained in paragraph 48 of the 2006 judgment, the local board of the NDLB "may" suspend or dismiss a dockworker who does not comply with an instruction. So the NDLB would be well within its powers if it exercised its discretion to refuse to discipline a dock worker who acted upon a warning given by the NDLB not to handle asbestos dust without being provided with a respirator. I am fortified in reaching that conclusion by the evidence of Mr. Terry Kelly that the NDLB was "not a harsh task master to the dockers" (paragraph 30). So he said that the NDLB were lenient in their approach to discipline on the docks and in this respect there was no fear of potential discipline from the NDLB if dock workers and the shop stewards refused to handle cargo.

V. Issue C. Was NDLB in breach of the duty of care which it owed to the claimants in the light of the risk of injury caused by the unloading of asbestos?

122. There is no doubt that NDLB did not give any warnings or any training to the dock workers and in particular to the claimants relating to the unloading of asbestos and the dangers to them of asbestos dust. No evidence was given of any steps taken by the NDLB which could be regarded as complying with its duty of care to the claimants. In paragraph 53 of the defendant's written skeleton argument prepared in advance of the trial, it was asserted that NDLB's Regional Medical Officer did make a recommendation passed on to NDLB by the Chief Medical Officer:-

"that the mass use of face masks and respirators be made to dock workers for use when working in dusty conditions".

123. It was then said in the defendant's skeleton argument that this recommendation would have been passed on to the National Joint Council ("NJC") and to the local

joint council with the cost of such provision being borne by the employers either directly or by paying higher wages to allow the men to buy them indirectly. It is the case of the defendant that *“that there is no reason to doubt that the recommendation of the Chief Medical Officer was passed on”*.

124. In the defendant’s skeleton argument prepared for Mr Kent’s closing submissions, it was pointed out that this recommendation was directed to work undertaken between 1959 and 1965 on bronchitis amongst dock workers. Indeed in his witness statement, Dr Jackson (the Medical Officer of the NDLB) said that he had no recollection that asbestos was considered to be particularly hazardous until 1966/1967 when there was publicity in the press about asbestos and considerable unrest in the dock among dock workers. As I explained in the 2006 judgment, I am unable to accept the evidence in the light of the material to which I referred in paragraph 51 and 52 of the 2006 judgment and which is very similar to those which I have set out in the present judgment.

125. I therefore reject the contention that there was any recommendation concerning the mass issue of face masks and respirators in connection with asbestos issued to the claimants or to any dock workers in Liverpool. So the position is that no evidence was adduced by NDLB of any steps taken in performance of its duty of care owed to the claimants. The NDLB did not do anything in performance of its duty of care. Indeed I have concluded that it totally ignored its important statutory duties.

126. As I have explained in paragraph 5 above, the Court of Appeal had stated in its judgment that *“to do nothing was not on the evidence an option available to the NDLB if they were to perform the duty which in my judgment they owed to the claimants”*. Thus I have concluded that the NDLB was in breach of the duty of care which it owed to the claimants but that leaves open the question of whether any such breaches were causative of the illnesses suffered by either claimant and that is the issue to which I now turn.

VI. Issue D. Were any of the breaches of duty committed by NDLB causative of the illnesses suffered by each of the claimants?

(i) Introduction

127. Mr. Cooksey submits that if the NDLB had complied with its duties (by giving warnings to the dock workers along the lines which I have suggested, training them correctly, ensuring that they were provided with respirators and/or by explaining that they would not be disciplined for refusing to handle asbestos dust without proper respirators), the claimants would not have suffered their illnesses or at least the prospect of them so suffering would have been materially decreased.

128. Mr. Kent disagrees and puts forward a number of submissions to the effect that any intervention or action by the NDLB (whether by giving warnings, by training, by providing respirators or by granting exemption from disciplinary proceedings if the advice of the NDLB on handling asbestos was followed) would not have made any difference to the work which the claimants would have done

at Liverpool docks with the consequence that each claimant would have continued to handle the asbestos dust.

(ii) *The functions of the NDLB*

129. The defendant contends that the NDLB was not involved in discussions about the way in which dock workers performed their work. It was pointed out by Mr. Kent that in 1955 Lord Crook the Chairman of NDLB said that:-

“..I should not like to say that it is impossible to do more, but we have no power to do it, and any attempt to do so would certainly be resented by the employers, by our usurping any of their functions, and to the extent that there were disputes on it would also be resented by the Ministry of Labour as taking over part of their functions so at the moment we stand in a very difficult situation when trying to do anything in the way of education for welfare work... If we had other powers it would be different we could do all sorts of things if the two sides were agreed”.

130. Mr Kent also pointed out that Professor Turnbull said that the response from the employers and the unions would always have been the same and that these were industrial matters, which should be under the control of the National Joint Council, which comprised of representatives of the employers and the unions and which negotiated rates of pay and other matters. It is true that Professor Whiteside pointed out that both employers and the unions were conscious of the freedom of the industry to regulate wages and working conditions and that in her view it was:-

“extraordinary for a statutory body composed of both sides of industry to have thought to extend statutory powers over the industry and that’s the problem I have continuously with this situation”.

131. Thus Mr Kent submits in the words of paragraph F(3) of his written skeleton argument in closing that:-

“the essential point is that the main protagonists (Port Employers and Unions) regarded issues relating to working conditions as matters which were to be satisfied within the NJC PTI (or its local manifestations) and would have resented and ignored any exhortation from the [NDLB] unless the [NDLB] were able to produce some new information unknown to those parties”.

To reinforce this point, Mr Kent points to the way in which working condition disputes were resolved by the NJC was illustrated by the meeting of the National Joint Council on 17 May 1967 in which asbestos cargos in London were

discussed. The important point for Mr Kent was that the NDLB “*was never involved in those discussions which he submits support the proposition that they were regarded de facto as having no relevant role*” (paragraph F(4) of the defendant’s closing written skeleton argument).

132. All these submissions ignore the crucial and overriding fact that NDLB had *statutory* duties to perform, indeed, as the Court of Appeal found in this case, it owed a duty of care to the dock workers which required positive action. Mr. Kent’s submissions are totally inconsistent with the decision of the Court of Appeal that the NDLB not merely owed the claimants a duty of care but also that “*to do nothing was not on the evidence an option available to the NDLB if they were to perform the duty which in my judgment they owed to the claimants*” ([44]).
133. It was not open to the NDLB to refuse to act because of the existence of the NJC as that would have amounted to an abandonment of its statutory obligations and would have conflicted with the decision of the Court of Appeal which required *positive* action on the part of the NDLB to perform its duty of care. It is important to stress that the NDLB, unlike the NJC was a statutory body and that it had statutory duties such as those relating to the welfare of dock workers and which I have described in greater detail in paragraphs 44 to 49 of the 2006 judgment. I agree with Mr Cooksley that this relationship between the NDLB and the NJC appears to have led the system to become bogged down in red tape but the existence of the NJC did not mean that the NDLB was absolved or in any way relieved from any of its statutory duties in relation to dock workers.
134. It therefore becomes necessary to consider what the effect would have been if the NDLB had issued any warnings of the kind which I concluded should have been given about the dangers of inhaling asbestos dust or had given training along those lines or had provided dock workers with respirators.

(iii) How the claimants and the other dock workers would have reacted to warnings of the kind which I concluded should have been given about the dangers of inhaling asbestos dust or had been given training along those lines or had provided dock workers with respirators?

135. There was substantial evidence of the collective power of the employees when dealing with dangerous cargo. In a witness statement admitted under the Civil Evidence Act 1995, Mr George Edgar, who was a dock worker from 1951/52 onwards and whose evidence was adduced on behalf of the defendant, explained that in the late 1960s the unions became aware of the health problems that might be caused by asbestos. He explained that at that time, the unions refused to unload asbestos in their bags and that it had become well-known that raw asbestos was dangerous to handle. Mr Edgar said that the unions organised a strike on a national scale and from that time, asbestos tended to arrive in packets.
136. He said that if asbestos was suspected of being on a ship in Liverpool and the NDLB had given the warnings about the dangers of asbestos dust, then the dock workers would have refused to unload the ship until the material had been identified and if it was then found to be asbestos, then the dock workers would not have unloaded the ship. The implication of that evidence is that if the NDLB

had given warnings of the kind which I consider should have been given to the claimants and the other dockworkers in Liverpool after 1955 about the dangers of coming into contact with asbestos dust without having respirators, then they would have refused to handle it.

137. Mr John Southward, whose evidence was also admitted under the Civil Evidence Act 1995, said that he commenced working as a dock worker unloading cargo in the Port of Liverpool in 1959. His evidence was that he was told of health dangers of asbestos by the stewards for the Transport and General Workers Union in the late 1960s when they told him to take more care and not to unload this cargo.
138. Mr Southward said that in about 1969 (which was after the end of the NDLB scheme), he was asked to unload a cargo which was covered by dust which he suspected was blue asbestos and which he had not previously seen at Liverpool Docks. He said that he told the union stewards who informed the stevedoring manager that the unions would not unload the cargo. Mr. Southward said the dust was confirmed to be that of blue asbestos and that the ship then went to Germany to be cleaned.
139. I should add the Mr. Southward said that *“a notice or a warning to dockworkers about the long term dangers and specifically that in 25 or 30 years time they might develop asbestos related diseases would have been easy to provide but probably would not have deterred dockworkers from unloading the cargo”*. I do not regard this as of great value because the warning should have related to the specific risk of tumours and mesothelioma and in any event Mr. Southward’s view is not consistent with the behaviour referred to in the preceding two paragraphs or the view of other dock workers.
140. Terence Kelly started working in the Liverpool Docks in late December 1966 and he explained that the NDLB was *“not a harsh task master to the dockers”*. So he said that the NDLB was lenient in its approach to discipline on the docks and accordingly there was no fear of potential discipline from the NDLB if dockers and the shop stewards refused to handle cargo. He added that the union power was *“awesome at the time”*. According to Mr Kelly, the union acted *“as a kind of interface”* between the NDLB and the port employer at the local level on matters relating to the welfare of dockers.
141. Mr. Kelly explained that by 1967 there were incidents where dockers refused to work where traces of asbestos were suspected on some ships. The clear impression which I gained from his evidence was what he described as the *“awesome”* power of the unions would have ensured that if the dock workers refused to unload cargo, their wishes would have been accepted and that the NDLB would not have disciplined any dock workers who complied with the wishes of their unions. This suggests that if the NDLB had issued the kind of warning which I have said should have been given, then the dockworkers and that would include the claimants, would not have handled the asbestos cargo.
142. I should also mention that Mr Kent points out that Mr Jack Cunningham, who was a dock worker from 1957, said in his statement said that *“I am not sure that such a warning where [about the danger of handling asbestos cargos or inhaling*

asbestos dust] would have made any difference". I do not consider this evidence of any value as: first this was a case in which I believe that the awesome power of the unions would have ensured that claimants and the other dock workers would not have handled asbestos which was not securely packed without being given respirators; and second that the warning referred to did not relate to the risk of cancer, of tumours or of mesothelioma.

143. The power of the unions to ensure that dock workers did not inhale asbestos dust when they became aware of the dangers of it is apparent from what happened at other ports when the dock workers were told of the dangers of asbestos and in particular that:-
- a. The Southampton Branch of the Transport and General Workers Union had confirmed that no asbestos whatsoever except cargoes packed in dust proof bags would be handled at Southampton Docks with effect from 20 June 1965;
 - b. In November 1966, dock workers in London refused to handle asbestos and the Transport and General Workers Union would appear to have been involved. The Transport and General Workers Union gave notice that it had advised its members working within the Ocean Trades that with effect from 2 January 1967 that they should not handle asbestos unless it was packed in bags which were impervious to the escape of dust or in containers which would have the same effect; and that
 - c. On 24 January 1967, there was a meeting at which the Ellerman and Bucknell Line reported that the difficulties in relation to asbestos in bags with stevedore labour at the West India Docks in London had spread to Hull while Union-Castle Line reported that labour in Southampton were then unwilling to handle asbestos in bags.
144. All this evidence satisfies me that any warning given to the claimants about the dangers of coming into contact with asbestos dust of the kind which I have concluded should have been given from 1955 onwards, would have led the claimants and others in Liverpool collectively, to refuse to handle asbestos cargoes which were not properly secured because of the dangers which would have included the risk of suffering from lung cancer and mesothelioma.
145. The upshot of this evidence is that there are four reasons which individually and cumulatively have led me to this conclusion: first, all the evidence indicates that when concern arose about asbestos-related injuries as a result of concerns being expressed by reputable sources, the dock workers united to refuse to handle it as I explained in paragraphs 135 to 144 above; second, I believe that the claimants and their fellow dock workers would have regarded any warning from the NDLB with very high respect and they would have been deeply worried about the concerns which the NDLB would have expressed; third, there is no evidence that

the claimants and the dock workers ever ignored a warning from the NDLB; fourth, if I had been in any doubt about this I would have been fortified in coming to this conclusion because the NDLB would not have disciplined the claimants if they had refused to handle asbestos as this stance was a corollary to the NDLB's duty of care owed to the claimants to give warnings as I explained in paragraphs 120 and 121 above.

146. In the case of Mr. Thompson, there is an additional reason why I believe that he would have refused to unload the asbestos. He gave evidence about how he would have reacted to warnings from the NDLB about the dangers of contact with asbestos dust. Mr. Thompson said that if he had been aware that there was risk of injury to his health in being exposed to asbestos "*I would have refused to have gone to the ship*". He also said he would not do a job that was dangerous. Later in his evidence, Mr. Thompson said that if he had refused allocation to a ship where he would have been exposed to a risk of injury by inhaling asbestos dust, he would have been potentially suspended for a week and he would have taken that up with the union after which he supposed that there would have been meeting over it.
147. His opinion is based on a false premise because, as I explained in paragraphs 128 to 131 above, the NDLB would as part of its duty of care to have had to inform the dockworkers that if they refused to unload asbestos in circumstances where they would have had to come into contact with asbestos dust without being provided with respirators, they would not be disciplined. In those circumstances, Mr. Thompson could have refused to handle asbestos if it was not safe to do so in the knowledge that he would not be disciplined. In addition, what has been described as the "*awesome*" power of the unions would have ensured that Mr. Thompson would not have had to unload inadequately packed asbestos without the use of respirators.
148. I have borne in mind that I should consider his evidence with care as Mr. Thompson now speaks with the benefit of hindsight. Even after taking that into account, in my view his evidence shows clearly that if the warning of the kind set out in paragraph 81 above had been given in 1966, Mr. Thompson would have refused to handle asbestos unless it was clear there was no risk of exposure to asbestos dust and that position would not arise if the asbestos had been properly packed. I have no reason to believe that Mr. Rice would have behaved differently if he had received the differing warnings which I have concluded should have been given to dockworkers and no submission was made that any particular personal factor would have led to him reacting differently from Mr. Thompson to warnings received from the NDLB.

(iv) How would the claimants have reacted if the warnings which should have been given are those contended for by the defendant?

149. Until now I have been considering this matter on the basis that the warnings which had to be given were those which I have held should have been given. I must now consider what the position would be if I am wrong and Mr. Kent is correct in his submissions on the warnings which should have been given (see paragraphs 44 and 45 above). In the case of Mr. Rice, it is said that the warning from NDLB to him should have stated that "*large quantities of asbestos dust*

should be avoided as it might cause progressive lung disease". The warning would have been relevant because Mr. Rice did through his work in the Liverpool Docks come into contact with "*large quantities of asbestos dust*". Obviously it has not been possible to hear evidence from Mr. Rice on this issue but the first three factors set out in paragraph 145 lead me to the conclusion that Mr. Rice would not have been prepared to unload the asbestos.

150. By 1966, the warning which the defendant says that the NDLB should have given would have been that which was given to Mr. Rice and that it ought to have been supplemented by advice that "*when encountering either large quantities of asbestos or unlined hessian bags, respirators ought to be worn (in the case of the latter) the rate of discharge slowed down*". Both claimants encountered large quantities of asbestos and unlined hessian bags and again I believe for the first three reasons set out in paragraph 145 above that the claimants would have refused to unload asbestos which did not comply with those conditions.

(iv) *The respirators*

151. I have concluded that if the claimants had been warned about the need to use respirators, they would have ensured that they would be provided with them. In reaching this conclusion, I have not overlooked Mr Kent's submission that even if the claimants should have been warned about the need to wear respirators, the dock employers would have been resistant to the provision of respirators as that would have doubled the time which the dock workers would have been required to spend on unloading asbestos. It is indeed true that the use of respirators would have slowed down the process of unloading as I will explain in paragraph 152 below. There is clear evidence both from Mr Thompson and in the Leathart and Sanderson article, to which I have referred, that it was very hot for the dock workers loading in the hold and that the use of respirators would have added to the discomfort of the dock workers.
152. In the Milton Report of August 1966 to which I have already referred in paragraph 83 above, it was pointed out that men using respirators were monitored and that it was then found that over a 14 minute period the rate of working was 25 slings per hour with the use of respirators has to be compared with the more usual rate of 35 slings per hour which would have been the effective rate in the absence of respirators. Mr Clarke also explained that men wearing respirators would have to take 30 minutes away from their work for each 30 minutes they spent working wearing the respirators.
153. Bearing in mind that the dock employers were anxious for unloading to be completed as quickly as possible, they would therefore have opposed any proposal which would have delayed the unloading process. I accept Mr Kent's submission that the dock employers would have been very hostile to the dock workers using respirators as it would have slowed down the unloading process.
154. In my opinion even if the dock employers had been hostile to the use of respirators, the views of the dock workers would nevertheless have been that they would not handle asbestos which was not properly packed without using respirators. As I have explained in paragraphs 135 to 148, the power of the dock workers supported as they would have been by the unions would have meant that

the dock employers would have had to give way and indeed they would have given way.

155. I consider that the dock workers would have insisted on using respirators if they had been warned that they should use them if there was any loose asbestos because it had not been securely and adequately packed in their loads, they should wear respirators, as otherwise they would be at risk even from transient contact with it of suffering a serious disease.

(v) Can the claimants recover damages and if so, for how much?

156. Mr Cooksley points out that for the claimants to succeed, the claimants need to show that the NDLB by its breach of duty materially increased the risk of the claimants suffering harm which was foreseeable. It is common ground that this means the claimants proving that but for such breaches of duty by NDLB, the risk of injury to the claimants would have been materially reduced regardless of whether they might nevertheless still have been exposed to asbestos sufficient to cause their injuries. In **McGhee v National Coal Board** [1973] 1WLR 1, the appellant suffered from dermatitis, which was attributable to working for his employer in processing brick kiln. The sole breach of duty relied on was a failure to provide medical washing facilities. The claim failed because the judge was not satisfied that the appellant had shown on the balance of probabilities that the breach of duty caused or materially contributed to his injury.

157. The House of Lords held that the breach of duty created a material increase in the risk of injury and that there was no substantial difference between materially increasing the risk of injury on the one hand and making material contribution to the injury on the other.

158. In **Transco v Griggs** [2003] EWCA Civ 564, the Court of Appeal made it clear that a material risk of sustaining a disease was sufficient to enable a claimant to recover. Hale LJ said (with my emphasis added) that:-

“in any event even if the but if test could not be satisfied, there can be little doubt that the employer’s failure to have a proper system for detecting and preventing vibration induced diseases materially increased the risk of an employee sustaining such a disease. Once the degree of exposure, the breaches of duty and the medical causation has been established, it would be an unjust legal system which did not hold the employer responsible for what had happened”.

159. This approach was followed by the Court of Appeal in **Brown v Corus** (UK) Limited [2004] PIQR in which the Court of Appeal rejected the decision of the judge at first instance that a defendant was not in breach of duty in failing to reduce the levels of vibration but that if he had the claimant would have faced very considerable and probably insuperable difficulty in relation to causation.

160. The basis of the reasoning of the Court of Appeal was that a claimant does not have to establish he would not have contracted the disease but for the breaches of duty. Scott Baker LJ explained(with my emphasis added) that:-

“what we think is plain in the present case is that by their wrong doing i.e. in particular by failing to reduce the appellant’s vibration exposure the respondents had materially increased the risk of the appellants suffering from HAVS or very least with their suffering from systems sooner than there would other wise have been the case. ...By not doing anything about vibration levels “and there are a number of things that could be done, the respondents materially increased the risk that the appellants would suffer from HAVS. Had they taken such tests they would have materially reduced the risks involved. Their failure to do so, in the words of Lord Simon in McGhee made a substantial contribution to the condition from which they suffer”.

161. On the facts of this case, subject to the issue of apportionment in Mr. Thompson’s case, both claimants must succeed because I am satisfied that the failure of NDLB to give the claimants warnings and training of the kind which I have stated should have been given and/or to supply the claimants with respirators created at least a material increase (if not an enormous increase) in the risk of the claimants suffering asbestos-related injuries of the kind which both claimants have suffered. The reason for that is that the claimants would have refused to handle any asbestos dust without being provided with respirators and this would have meant that the material risk of the risk of either of them suffering from an asbestos-related injury would not have occurred or would have been much less. I can go even further and add that if the warning (which I have concluded should have been given) had been given when Mr. Rice started working as a dock worker in 1955 and Mr. Thompson when his employment as a dock worker started in 1966 and they had been provided with respirators, then I am satisfied that neither of them would have run any risk of suffering any asbestos-related injury and the same applies at all times during their employment.
162. Mr. Kent accepts the argument that because Mr Rice’s condition of mesothelioma was indivisible, the decision in **Fairchild v Glenhaven Funeral Homes** [2003] 1 AC 32 provides a special rule whereby each tortfeasor, who is responsible for materially increasing the risk, is treated as having caused the disease. In addition, section 3 of the Compensation Act 2006 (which reverses **Barker v Corus** [2006] 2 AC 572), provides that each tortfeasor is liable in full subject to any right of contribution from any other. So the claim by Mr. Rice’s widow and estate succeeds.
163. To recover his full loss, Mr Thompson still has to succeed on the issue of apportionment to which I will now turn.

(v) *Divisible disease*

164. It is common ground that Mr. Thompson's position is different from that of Mr Rice because he suffers from a "*divisible disease*" namely diffuse pleural thickening and he suffers from a psychological reaction which is a consequence of the diagnosis.
165. It is common ground that Mr. Kent submitted correctly that:-
- a) in **Holtby v Brigham and Son Cohan Limited [2000] ICR 1086**, it was held by the Court of Appeal that exposure to asbestos by several tortfeasors imposed the liability on each tortfeasor only for that part of that divisible condition properly attributable to its own breach and this principle applies to any divisible condition of which pleural thickening is one and that is to say a condition which is made worse by additional exposure.
 - b) Psychiatric injury is compensatable but this is not a "free-standing" claim but it can only be the subject of compensation as a consequence of the pleural thickening and so he submits that as with any consequential damage it has to be apportioned as part of the award for that divisible condition (see **Rahman v Arearose Limited [2001] 1 QB 351**;
 - c) for Mr Thompson to recover in full, he must in the words of Mr. Kent's written skeleton argument "*prove that, but for any breach by NDLB, his exposure to asbestos would have been avoided altogether or reduced to a negligible level (i.e. a level at which his risk of asbestos related disease was not materially increased above that to which the population as a whole was exposed)*"; and
 - d) that the burden of proving this rests on Mr. Thompson but he cannot be expected to prove precisely the apportionment and a fairly rough and ready approach will be sufficient (see **Allen v British Rail Engineering [2001] ICR 942**).
166. I must therefore consider the position if the NDLB had complied with its duty of care. In that situation for the reasons which I have explained, Mr. Thompson: first would have been warned about the risks of asbestos dust exposure; second would have been given training about it; third would have been provided with respirators where appropriate; and fourth would have received a reassurance from the NDLB that if he refused to come into contact with asbestos dust without adequate precautions, he would not be disciplined by the NDLB.
167. In that event, Mr. Thompson explained that if he had been told of the dangers of asbestos dust, he would have refused a job which required him to be exposed to it without a respirator even without the protection of an assurance that he would not be disciplined. I accept that evidence and in my opinion, he would definitely have refused to carry out such work especially as he ought to have been reassured by the NDLB that if he refused to come into contact with asbestos dust without adequate precautions he would not be disciplined thus essentially for the reason set out in paragraph 145 above, I believe that Mr. Thompson would have refused to have any contact with asbestos dust without being provided with proper protection and that in consequence he would not then have suffered any of the

illnesses for which he is claiming. I should stress that no medical evidence has been adduced to show any other cause of Mr. Thompson's condition.

168. Even if the appropriate warnings were those advocated by Mr. Kent and which are set out in paragraph 45 above, I am quite satisfied that if the NDLB had complied with its duty of care to Mr. Thompson, then his exposure to asbestos would have been avoided altogether or it definitely would have been reduced to a negligible level being a level at which his risk of asbestos related disease was not materially increased above that to which the population as a whole was exposed. The reason for that conclusion is, as I set out in paragraph 150, Mr. Thompson would have refused to unload asbestos unless he was provided with a respirator. This would also have been the position if any complaint had been made that Mr. Thompson's condition was a result of him working for other dock employers covered by the NDLB scheme.

VII. Conclusion

- 169 The damages are agreed as follows:-

The executor of Mr. Rice is entitled to judgment for:	
Damages agreed at	£120,376.48
Interest thereon	£33,429.32
Less Pneum Con Act 1979	£13,502.00
Less CRU (against Care)	£1,338.15
Balance payable	£138,965.65
Mr. Thompson is entitled to judgment for:	
Provisional Damages including interest	£37,000.00
Less Pneum Con Act 1979	£9,171.00
Less payment received from D2	£2,500.00
Balance payable	£25,329.00