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1997 No 3074

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

GEORGE BITTLES

Plaintiff

and

HARLAND & WOLFF PLC &
A W HAMILTON & CO LTD

Defendants

JUDGMENT

GIRVAN J

Introduction

The plaintiff who was born on 9 November 1941 brings this action claiming damages for personal injuries sustained as a result of being exposed to asbestos dust during his earlier working life as an apprentice engineer with A W Hamilton & Co Ltd between 1956 and 1961 and as a fitter with Harland & Wolff between 1963 and 1966. In the course of employment by the defendant the plaintiff was required to work in atmospheres heavily contaminated with asbestos particles and dust. As a result of his exposure to asbestos in those years he has subsequently developed asymptomatic pleural plaques. It is his case that he has suffered

severe clinical depression as a result of the discovery that he has an asbestos related condition which reveals that he could develop much more serious medical conditions such as asbestosis and mesothelioma.

On the hearing of the action Mr Hill QC appeared with Mr Egan on behalf of the plaintiff. Mr Elliott QC appeared with Mr Maxwell on behalf of the defendants.

The Liability Issue

The defendants did not contest the plaintiff's evidence that he had been exposed to asbestos dust during his years of employment with the defendants and that the defendants had taken no precautions to protect him against the risk of inhaling asbestos dust. During the relevant years the risk of asbestos exposure causing injury to employed persons was or ought reasonably to have been known to the defendants. The plaintiff must succeed on the issue of liability. Although the defendants pleaded contributory negligence no case of contributory negligence has been made out and accordingly I find in favour of the plaintiff in full on the issue of liability.

The Plaintiff's Injuries

In his amended Statement of Claim the plaintiff's particulars of personal injuries allege –

a) pleural plaques; and
b) a depressive illness sustained by reason of the diagnosis of pleural plaques.

In the amended Statement of Claim the plaintiff claimed provisional damages with the leave of the court to apply for further damages in the event of the plaintiff contracting mesothelioma, cancer, heart conditions or asbestosis.

In opening the case Mr Hill QC stated that the plaintiff did not wish to have provisional damages but wanted a once and for all award to compensate him for the risk of contracting

any other asbestos related conditions. Ultimately, however, he advised his clients to seek provisional damages and accordingly the action proceeded on that basis.

The plaintiff presented with complaints in relation to his left chest in 1987. He was admitted to Foster Green Hospital where an X-ray revealed left lung shadowing and he was bronchoscoped. No diagnosis was made at that time. He remained well until September 1996 when he complained of pain in his left upper arm. As a result he underwent a further X-ray which showed a shadow on the left lung base. When seen by Dr Shepherd he complained of shortness of breath on exertion. The X-ray revealed pleural thickening at the lower left side. A CT scan revealed pleural plaques on both hemi-diaphragms particularly on the left side where there was heaped up plaque and this was the presumed cause of the opacity in his chest X-ray. Elsewhere there was no evidence of any diffuse interstitial fibrosis and there was no evidence of any cancer. Pulmonary function tests were normal. There was no evidence of airflow obstruction and a normal transfer factor was found. Dr Shepherd described the pleural plaque on the left side as very exuberant. As Dr Shepherd points out in his report pleural plaques are caused by asbestos exposure and are a radiological marker for asbestos exposure.

However, in themselves pleural plaques do not cause any disability of pulmonary function nor are they pre malignant in themselves. There is a small risk that the development of further pleural plaques could lead to a degree of breathlessness. Because of the asbestos exposure and the findings of pleural plaques the plaintiff is at an increased risk of developing asbestosis and asbestos related cancer in the future. Dr Shepherd considered that there is a 1 in 14 chance of developing an asbestos related cancer, usually a mesothelioma. He also considered that there was a 1 in 20 chance of developing asbestosis. When the plaintiff was seen by Dr Shepherd in September 1999 Dr Shepherd found no material change in his condition and no evidence of asbestosis or cancer. Although the consultant radiologist found

a number of linear shadows he found no other radiological evidence of asbestosis and pointed out that to substantiate asbestosis it is necessary to have a profusion of abnormality in both lungs.

In the light of the medical evidence there is no sufficient evidence to make a diagnosis of asbestosis in view of the absence of crackles or evidence of any diffuse sub-pleural changes. Accordingly the court can find no evidence of any physical condition other than the presence of calcified pleural plaques.

It is the plaintiff's case that as a result of learning that he had an asbestosis related condition he became severely clinically depressed. It appears that he did attend his GP and was prescribed Prozac and then had to be referred to Albertbridge Road Day Hospital where he was seen in May 1997. He was admitted to Knockbracken Healthcare Park and has had to be treated on an ongoing basis at the day hospital since then. He has been receiving anti-depressant medication with regular changes of medication. The evidence establishes that he became increasingly socially isolated and uncommunicative. He is withdrawn and irritable. He and his wife have separated on occasions though the evidence indicates that there were pre-existing marital tensions on occasions before the diagnosis.

The evidence shows that before the diagnosis the plaintiff was suffering from some symptoms of depression following his redundancy. His mother had a history of depression. The defendant's psychiatric expert concluded that the plaintiff was constitutionally vulnerable to depression but he did not consider that he was suffering from clinical depression. He considered that to find clinical depression it is necessary to look at the level of complaints, the objective findings and the level of the patient's functioning. Dr Fleming considered that the plaintiff was functioning fairly well but accepted that he required ongoing treatment and support. The plaintiff himself gave evidence that when he took voluntary redundancy because of a back complaint he was not particularly joyful as a result but denied

that he had been depressed. He accepted that with medication and relaxation technology he had impoved over the last year. His wife herself is not in good health and her health is a cause of concern to the plaintiff which must be contributing to the plaintiff's present depressive condition.

I am satisfied on this aspect of the case that the plaintiff did suffer a depressive condition which was significantly aggravated by the diagnosis of an asbestos related illness. He suffers ongoing worry and anxiety as a result of learning of his exposure to asbestos and as a result of his realisation that he is at risk of developing other conditions.

Quantification of the Claim

In a case such as the present where the plaintiff has been exposed to and has inhaled asbestos dust as a result of the defendant's negligence and has in consequence developed pleural plaques, the development of the pleural plaques even if asymptomatic represents bodily damage and a personal injury which when combined with the defendant's breach of a duty of care brings about the establishment of a cause of action against the defendant. It is trite law that for a plaintiff to succeed in an action for negligence he must establish a duty of care, a breach of that duty and consequent damage. Once the plaintiff has suffered the physical bodily damage represented by the pleural plaques his cause of action has accrued and the plaintiff's claim will relate to all the physical consequences and risks which flow from the negligence. Thus the plaintiff is entitled to recover damages both for the pleural plaques and for the risks of developing more dangerous medical conditions such as asbestosis and mesothelioma.

Until it was given power to award provisional damages the court had to assess damages on a once and for all basis and thus a plaintiff who had the risk of developing a condition such as asbestosis or mesothelioma was only entitled to damages representing a quantification of the value of the risk. Such an approach was perceived to have

disadvantages to a plaintiff and was potentially unjust to a plaintiff who subsequently developed the various serious conditions in respect of which he had been compensated for the mere risk of developing. It was for this reason that by the Administration of Justice Act 1982 the court was empowered to award provisional damages. The provision applies to personal injury claims in which "there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition." The statutory provision enabled Rules of court to be made for the awarding of damages assessed on the assumption that the injured person would not develop the disease or suffer the deterioration in his condition and further damages at a future date if he develops the disease or suffers the deterioration. In this jurisdiction rules of court to give effect to the statutory power to award such damages were made with effect from 2 September 1991 in Order 37 Part II. In Willson v Ministry of Defence [1991] 1 All ER 630 Scott Baker J pointed out that three questions are to be considered in relation to deciding whether an award of provisional damages should be made. The first question turns on the issue whether it is proved that there is a chance of some serious disease or some deterioration developing in the plaintiff's physical condition. The second question turns on the words "serious deterioration" in his physical condition. The third question is whether the court should exercise its discretion in favour of awarding provisional damages as opposed to final damages. In that case the court considered that the section envisaged a clear and severable risk rather than a continuing deterioration (for example in a typical orthopaedic case). Many disabilities follow a developing pattern in which the precise results cannot be foreseen but such cases are not suitable for provisional damages. The courts have to do their best to make an award on the light of a broad medical prognosis. There should be some clear-cut event which if it occurs triggers an entitlement to

further compensation. Asbestos related conditions are classic examples of cases where provisional damages are called for. In a case such as the present there is a quantifiable if small risk of asbestosis or mesothelioma or other cancer developing. The development of such conditions would be devastating to the plaintiff and would attract very substantial damages. At this point in time an assessment of the value of the risks of sustaining these conditions would produce a relatively modest figure. The evidence also established that there is a small risk of further pleural plaques developing with the risk that this might lead to a chance of increased breathlessness. In Patterson v Ministry of Defence (1987) CLY 1194 Simon Brown J helpfully set out the correct position in such a case.

> "Of course, one great advantage of a provisional damage award is that it is unnecessary to resolve differences such as arise here between the specialists, as to the precise extent of the risk to which the plaintiff is now exposed. Justice can and will be done whichever view is correct. Accordingly, I have no hesitation here in making an award of provisional damages namely an award assessed on the assumption that the plaintiff will not in future develop mesothelioma and which will enable him to return to court for further damages if, much against the odds, that condition does develop in future. I do not however regard it as appropriate to deal similarly with the risk of further pleural thickening occurring and a chance of increased breathlessness that it carries with it. The chance of this occurring is plain. Indeed I have already assessed it in the region of 5% but I am unconvinced that even if the risk matures it will produce a serious deterioration in the plaintiff's physical condition within the meaning of the statute. Furthermore, even if I were satisfied of this, I would not regard it as appropriate to leave this matter over for future legal proceedings … Generally speaking it appears to me desirable to limit the employment of this valuable new statutory power to cases where the adverse prospect is reasonably clear cut and where there would be little room for later dispute whether or not the contemplated deterioration had actually occurred".

In the circumstances of this case the court in the exercise of its discretion considers that it is appropriate to assess provisional damages on the assumption that the plaintiff will not in future develop asbestosis, mesothelioma or lung cancer or any heart condition attributable to

exposure to asbestos. This will enable the plaintiff to return to court for further damages if any of those conditions should develop.

The court accordingly must proceed to assess damages to compensate the plaintiff in respect of his current medical condition disregarding the possibility of him developing those conditions. This thus involves a quantification of the claim in respect of pleural plaques and the psychiatric damage which the plaintiff alleges is attributable to the negligence of the defendants.

There was much debate before the court as to how the court should approach the assessment of damages in a case of a asymptomatic pleural plaques. The court's attention was drawn to the scale of damages specified in the JSB Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland. In 5B(a) in respect of calcified plaques with pleural thickening but no present risk of functional impairment or of cancer it is suggested that a range of £5,000-£10,000 would be appropriate. Mr Elliott QC argued that if this range related solely to the physical damage caused by pleural plaques it was unreasonably high where the pleural plaques are asymptomatic and he compared the range with that of other ranges of damages in relation to, for example, injuries leading to collapsed lungs from which a full and uncomplicated recovery is made where the suggested range is £2,000-£6,000. He contended that the figure in the JSB Guidelines must be intended to include a substantial element for anxiety and worry flowing from the discovery that the plaintiff is suffering from pleural plaques as a result of exposure to asbestos and that the exposure to the asbestos has put him at risk of developing much more serious conditions such as asbestosis or mesothelioma.

Although a pleural plaque is asymptomatic as already noted its development is sufficient to give rise to a cause of action. A plaintiff is thus entitled to damages on some basis in respect of the development of the pleural plaques.

The current English JSB Guidelines do not have an equivalent category to that set out in the Northern Ireland Guidelines. In the suggested scales in respect of lung diseases at 5B(e) in respect of "bronchitis and wheezing; pleural plaques or thickening not causing serious systems, little or no serious or permanent effect in working or social life; varying levels of anxiety about the future it is suggested that the appropriate range is £10,000-£15.000. In paragraph (g) provisional awards for cases otherwise falling within (f) or the least serious cases within (e) where the provisional award excludes any risk of malignancy or of asbestosis" the suggested range is £2,500-£5,000.

The reference in (g) to (f) is a reference to the section dealing with some slight breathlessness with no effect on the working life and the likelihood of substantial and permanent recovery within a few years as a result of the exposure to the cause or the aggravation of an existing condition where the range is £5,000-£10,000.

It cannot be said that either the English or the Northern Ireland Guidelines are particularly clear as to what exactly is covered within the individual sub-paragraphs.

The approach of the courts in England and Wales and that of the Northern Ireland courts in the actual assessment of damages in cases such as the present has been somewhat different. In Sykes v Ministry of Defence (TLR 23 March 1984) in a case where the plaintiff had developed asymptomatic calcified pleural plaques with a small risk of developing other lung conditions Otton J made an award of £1,500 holding that the plaintiff had suffered some physical damage ie the pleural plaques (which were actionable) and was entitled to be compensated for the albeit slight risk of developing the other conditions. In McCarthy v Abbott Insulation (1999) the plaintiff developed benign symptomless bi-lateral pleural plaques. He had no impairment of the lung functions but he suffered anxiety from knowledge that he had an asbestos related condition. He also had a risk of developing asbestosis or mesothelioma or lung cancer. The court awarded £5,500 for the pleural plaques and anxiety

and £8,000 for the risk of the future medical conditions together with £2,000 for future non-malignant disability. In Thorn v Powergen Plc (1997) PIQR at Q71 the trial judge awarded £7,000 to the plaintiff who had bi-lateral pulmonary plaques and who was at risk of developing mesothelioma and lung cancer due to exposure to asbestos. The award of £1,500 under Smith v Manchester was appealed but not the award of £7,000.

In the context of the Northern Ireland cases I was referred to the judgments of Carswell LJ in Dale v Vulcanite Ltd (1995), the 1999 decision of McCollum LJ in Gardner v Scruttons Plc, the 1999 decision of Campbell LJ in Kelly v Harland & Wolff and the 1999 decision of Coghlin J in Maguire v Harland & Wolff.

In Dale the plaintiff was awarded £20,000 general damages for exposure to asbestos dust. In that case the plaintiff suffered a severe and chronic pulmonary disease, the result of years of heavy smoking. The medical issue was the extent to which the plaintiff was also affected by the inhalation of asbestos. That case does not provide assistance on the valuation of damages in pleural plaques cases. In Gardner the deceased had died of pleural mesothelioma attributed to the exposure to asbestos. In that case McCollum LJ considered that the basic core award for the mesothelioma to represent the bodily injuries sustained and the effect on the health of the deceased should be £25,000 to include the mental suffering attributable to the discovery of the existence of the condition. He also awarded £7,500 for the actual pain and suffering he suffered prior to his death. As in the case of Dale that case is of little assistance in the quantification of pleural plaques though it is significant that the court there wrapped up in the core award the element of anxiety and upset attributable to the diagnosis. In Kelly v Harland & Wolff the plaintiff suffered from pleural plaques. A medical expert had made a diagnosis of asbestosis which in retrospect turned out to be wrong. Campbell LJ referred to the range of £5,000-£10,000 in the JSB Guidelines in this jurisdiction but did not indicate whether he considered that they included an element of anxiety and upset. In that

case the award was £17,500 which included compensation for the pleural plaques and the emotional upset attributable to the diagnosis of actual asbestosis which much inevitably have been much greater than a diagnosis of pleural plaques with advice that there was a very small risk of developing asbestosis or other conditions. In Maguire the plaintiff had bilateral pleural plaques together with bilateral pleural thickening. The plaintiff had been shown a document by medical staff suggesting that he had asbestosis but in fact he did not. Despite reassurances he believed that he had developed asbestosis. Coghlin J in his judgment considered that it was clear that the figure of £5,000-£10,000 in the JSB Guidelines excluded compensation for any anxiety arising from the existence of associated risks. He awarded £22,500 which included compensation for the bilateral plaques, the anxiety suffered by the plaintiff in the circumstances of the case and for the risk of other asbestosis related claims.

As pointed out by Sir John MacDermott in the foreward to the JSB Guidelines those guidelines are not intended to be a ready reckoner. Suggested valuations are guidelines and will best be used as a check on a tentative valuation reached after careful consideration of how particular injuries have affected particular individuals. He recognised that the headings were somewhat rigid and did not reflect the frequent situation where injuries were multiple, varied and at times overlapping. In conclusion he said –

> "We would repeat what we have already said: this book must be used cautiously and sensibly. The figures which we suggest are no more than guidelines and must always be treated as such and kept under regular review."

Many injuries or medical conditions bring with them emotional upset and worry because of their nature or because of their possible or probable future development. The emotional and physical impact may affect different plaintiffs differently. Thus, for example, in the case of facial scarring the guidelines rightly indicate that the level of damages will include the mental reaction to the injury and in the case of young females this is likely to be significantly higher than the case of older males. In other cases the emotional or physical impact of an

injury may be greater for one plaintiff as against another. A young pianist who has sustained an injury to his hand may well suffer much greater element of worry and anxiety about the impact of the injury than a retired bank official.

For calcified plaques which of themselves cause no disability and are asymptomatic to attract levels of awards of £5,000-£10,000 there must be some element over and above the mere physical change in the plaintiff's lung. Where, for example, a person dies as the result of a motor accident and an autopsy reveals the presence of pleural plaques of which the plaintiff was entirely unaware during his lifetime an award in the range suggested by the guidelines would be difficult to understand or to justify. If the range is not intended to include the element of upset and worry then the range seems to be out of line with other suggested awards in the guidelines. Reference had already been made to the suggested range in the case of injuries leading to actual collapse of lungs albeit where a full and uncomplicated recovery is made. For simple factures of the jaw requiring immobilisation from which recovery is complete the suggested range is £5,000-£7,500. Soft tissue injury to the shoulder with considerable pain from which a complete recovery is made attracts an award of up to £7,500. Other examples can be multiplied.

In as much as the range must be intended to include the element of emotional upset it is very much an approximate range for the reactions of individual plaintiffs to learning of a diagnosis of pleural plaques will inevitably be idiosyncratic and varied. Some individuals of great fortitude may be happy to accept advice that the risk of developing other conditions is so small that it should be forgotten about. Others may not so easily be reassured and their worry and anxiety may be accentuated by the knowledge of friends and relatives who have suffered death or serious injury as a result of exposure to asbestos. Thus the element of anxiety will vary considerably so much so that in some cases, such as the present, the

diagnosis of pleural plaques may lead on to a distinct psychiatric condition which is beyond mere anxiety and upset.

It will often be unnecessary and inappropriate to split an award in respect of pleural plaques into the elements of the physical damage and the emotional upset. The court will normally seek to establish a figure which compensates the individual plaintiff for what he has suffered in consequence of the condition. This plaintiff has suffered a significant injury as a result of having been exposed to and having inhaled asbestos dust and that includes the physical element of damage to the lung and the psychiatric damage. The award must also take account of the risk albeit small that further pleural plaques may develop and cause some impairment to his breathing.

I consider that in the present circumstances the appropriate award of provisional damages should be £22,500. In the event of the plaintiff at a future date developing asbestosis, mesothelioma, lung cancer or any heart condition attributable to his previous exposure to asbestos he may apply to the court for further damages. I do not consider that it is appropriate under Order 37 Rule 8(2) to limit the period within which such a claim can be brought. I shall hear counsel on the question of interest and damages and on the question of costs.

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