Neutral Citation No. [2015] NICA 28 | *Ref:* **GIR9639**

Judgment: approved by the Court for handing down | *Delivered:* **20/05/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

_____

Between

CAROL McCAULEY
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
WILLIAM McCAULEY (DECEASED)

Plaintiff/Respondent

and

HARLAND AND WOLFF PLC

First Defendant/Appellant

and

ROYAL MAIL GROUP LIMITED

Second Defendant

_____

Morgan LCJ, Girvan LJ, Gillen LJ

GIRVAN J (delivering the judgment of the court)

Introduction

[1] This is an appeal by the first defendant Harland and Wolff Plc ("the Appellant") from the judgment of O'Hara J ("the trial judge") who on 27 June 2014 awarded the plaintiff Carol McCauley ("the respondent") as personal representative of the estate of William McCauley ("the deceased") the sum of £10,000 damages for personal injuries, loss and damage sustained by reason of the appellant's negligence in causing asymptomatic pleural plaques to develop in the deceased's lungs. This is the first occasion on which the courts in this jurisdiction have had to consider the proper measure of damages in such a case since the coming into operation of the Damages (Asbestos Related Conditions) Act (Northern Ireland) 2011 ("the 2011 Act") which had the effect of reversing the House of Lords ruling in Rothwell v Chemical Engineering [2007] UKHL 39 ("Rothwell") in which the House of Lords

held that a plaintiff with asymptomatic pleural plaques could establish no compensatable harm and was thus not entitled to damages.

[2] Mr Simpson QC appeared with Mr Maxwell on behalf of the appellant. Mr Keenan QC appeared with Mr O'Hare on behalf of the respondent. The court is grateful to counsel for their helpful written and oral submissions.

Evidential background

[3] The respondent is the widow of the deceased who died on 20 February 2013 at the age of 74. The cause of death was multiple organ failure following cardiomyopathy, a disease of the muscle of the heart. The deceased's death was not related to any exposure to asbestos. Exposure to asbestos had occurred while the deceased was in the employment of the appellant prior to 1961 and in his employment with the second named defendant between 1964 and 1980. Pleural plaques appeared on an x-ray of the deceased's chest taken on 2 September 1991. It is accepted on the pleadings that it was not until 10 February 2012 that the deceased was informed of the presence of the plaques. It is common case that the pleural plaques did not give rise to any symptoms. When the diagnosis of pleural plaques was brought to his attention, according to the respondent it caused the deceased anxiety and stress, more so than his heart condition. She herself suffered from asthma and the deceased did not like to see the effect that the condition had on her. He was also anxious because he knew of others who died from asbestos related diseases. It was common case that he had not suffered from any identifiable psychiatric condition following discovery of the condition.

The trial judge's conclusions

[4] The trial judge concluded in the light of his analysis of the intention and effect of the 2011 Act that there was no reason not to revert to using the earlier guidance on quantum while allowing some increase in the range by reference to the changes in the RPI. He decided to allow costs on the High Court scale because the case raised an issue which justified proceeding in the High Court.

The parties' submissions

[5] Mr Simpson argued that the effect of the 2011 Act was to allow the plaintiff to surmount their hurdle of the *de minimis* principle but nothing more. The Act is silent in relation to the physical effects which it is proper to take into consideration when assessing damages. The pre-2011 case law erroneously concluded that pleural plaques were an injury to health and a significant bodily injury. Those cases and the previous damages guidelines contained in what are commonly called the Green Books cannot provide a proper basis on which to approach the current assessment of damages for pleural plaques which must take account of the reasoning in Rothwell.

He invited the court to take the opportunity to state that the pre-Rothwell guidelines and case law do not provide a proper basis on which to assess general damages in cases of asymptomatic pleural plaques. Mr Keenan, however, submitted that the court should revert to the levels of awards that prevailed pre-Rothwell (updated to reflect the reduction on the value of money). He argued that the trial judge was correct to conclude that there was no reason not to revert to using the earlier guidelines as authority on the appropriate quantum.

The pre-Rothwell approach in Northern Ireland

[6] As pointed out by the trial judge in paragraph [12] of his judgment, it is clear from the case law in Northern Ireland that until the early 2000s damages were awarded for asymptomatic pleural plaques, even where the deceased was unaware of the presence of the plaques during his lifetime. In the 1997 Edition of the Guidelines for the Assessment of General Damages in Personal Injury Cases ("the Green Book") prepared under the chairmanship of MacDermott LJ the range of damages for calcified pleural thickening but presenting no risk of functional impairment was expressed to be in the range of £5,000-£10,000.

[7] Two schools of thought emerged in relation to the proper approach to the assessment of damages in respect of pleural plaques. These differences turned on the question of whether the guidelines incorporated an element of upset and worry or whether they reflected only the physical aspect of the presence of the pleural plaques. In Bittles v Harland & Wolff Plc [2000] NIJB 209 I said:

> "*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." (italics added)

Gillen J took a similar view in Phillips v Harland & Wolff (GILC3230 – unreported 27 June 2000) where he stated:

> "While the matter is not without some authorative dispute, it is my view that these figures do include some element of upset and worry which would normally accompany such conditions. *Accordingly, in the highly unusual circumstance where, as in this instance, the deceased*

> *was unaware of his condition and was without any perceived physical pain the figure for compensation would fall below the bottom figure of the suggested guidelines if no other element existed."* (italics added)

[8] However, in Weir v Harland & Wolff Plc in a judgment given on 31 January 2002, in a case where the deceased never knew that he suffered from the condition before he died and which was discovered in an autopsy, Kerr J preferred to follow the approach of Coghlin J in Maguire v Harland & Wolff Plc (unreported 19 December 1999)-] and Sheil J in Mallon v Harland & Wolff Plc (unreported 24 November 2000) and he rejected the view that the range of £5,000-£10,000 included an element of upset and worry. He concluded that:

> "The existence of pleural plaques is *a significant bodily injury, not to be lightly disregarded* even as a person whose physical makeup has been thus affected is unaware of it and is therefore relieved of the worry that must inevitably be associated with it. … Ignorance of the condition does not alter the intrusive nature and those *grave consequences* although the award of damages will be commensurably higher if the plaintiff knew of it and is subject to prolonged worry and anxiety as a result." (italics added)

See also decisions such as Kennedy v Harland & Wolff Plc, Weatherup J [2002] NIQB 11.

[9] Following the division of views as to what was intended to be covered by the original range of £5,000-£10,000 (physical damage or physical damage plus consequential anxiety and distress) new guidelines in the 2002 Edition of the Green Book were prepared under the chairmanship of McCollum LJ. In this edition the range for plaques and/or plural thickening with no functional impairment would be within the range of £5,000-£15,000 with additional damages for prolonged anxiety and worry particularly if such anxiety or worry had been exacerbated by a scare as to whether this plaintiff had developed a tumour. The width of the range of £5,000-£15,000 and the provision for additional damages for "prolonged" anxiety leaves open the question of whether the range starting at £5,000 included an element of the inevitable initial anxiety and worry which discovery of the condition will instil in any person of reasonable fortitude. The range as thus expressed in the second edition of the Green Book did not definitively resolve the difference of approach taken by different judges prior to the decision in Rothwell. In any event matters were overtaken by the Rothwell decision.

The Rothwell Decision

[10] In Rothwell the House of Lords unanimously held that since pleural plaques cause no symptoms and since their presence does not increase the chances of

developing any other asbestos related condition or shorten life expectancy their presence does not constitute an injury giving rise to a claim in tort. Lord Hoffman considered that pleural plaques could not be considered a disease or impairment of physical conditions. He concluded that, if he were wrong in that, they should be disregard as *de minimis*. That status could not be altered by invoking anxiety arising out of the articulated risks. Lord Hope considered that before a claim could be made there had to be "real damage" as distinct from damage which is purely minimal". He considered that the pleural plaques constitute a form of injury but they were not harmful. Lord Rodger pointed out that asbestos fibres cannot be removed from the claimant's lungs. He said that:

> "In theory, the law might have held that the claimants had suffered personal injury where there were sufficient irremovable fibres in their lungs to cause them heightened risk of asbestos and mesothelioma. But the courts have not taken that line."

[11] Disease anxiety caused by a physical condition for which the defendant's negligence is responsible is an allowable head of claim (see for example Lady Hale in Gregg v Scott [2005] 2 AC 176 at paragraph [206], Lord Phillips at paragraph [191] and Lord Hope at paragraph [123]). However, physical harm or a recognisable psychiatric condition must first be established. Since the House of Lords rejected the presence of physical harm their Lordships rejected the existence of any separate freestanding claim for distress and anxiety arising from knowledge of the presence of pleural plaques.

[12] Oliver Wendell-Holmes famously stated in his "The Common Law" [1881] that:

> "The life of the law has not been logic: it has been experience … it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

The decision in Rothwell represented an outcome flowing from an application of cold axiomatic logic. While it is difficult to gainsay the ruthless logic of the reasoning, the decision resulted in an outcome that deprived of compensation a large number of individuals who suffered from anxiety and stress engendered by the diagnosis of pleural plaques which were a clear marker of their dangerous exposure to asbestos. The cruel dangers of such exposure are all too well known. The outcome of the Rothwell decision was widely perceived as unjust.

[13] This perceived injustice led in England and Wales to the introduction of an extra-statutory scheme confined to those diagnosed with pleural plaques who had raised a claim for damages prior to 17 October 2007, the date of the decision on Rothwell. Under that scheme claimants would receive a one-off payment of £5,000

from state funds if application was made prior to 1 August 2011. The Scottish Parliament and the Northern Ireland Assembly responded differently by legislating to reverse the decision. The difference between the Scottish and the Northern Ireland approaches on the one hand and the English approach on the other was that the Scottish and Northern Ireland legislation created a new category of actual bodily injury.

[14] Section 1 of the 2009 Scottish Act provides that:

> "(1) Asbestos related pleural plaques are a personal injury which is not negligible.
>
> (2) Accordingly, they constitute actual harm for the purpose of an action of damages and personal injuries.
>
> (3) Any rule of law the effect of which is that asbestos related plural plaques do not constitute actual harm ceases to apply to the extent that it has that effect."

[15] Section 1 of the 2011 (Northern Ireland) Act provides:

> "(1) Asbestos related pleural plaques are a personal injury which constitutes actual damage for the purposes of an action for damages for personal injuries.
>
> (2) Any rule of law the effect of which is that asbestos related pleural plaques do not constitute actionable damage ceases to apply to the extent it has that effect."

[16] The Supreme Court in AXA General Insurance Ltd v The Lord Advocate [2011] UKSC 46 rejected the insurance industry's challenge to the compatibility of the Scottish Act with Article 1 Protocol 1 of the Convention. It also rejected the argument that the Act was *ultra vires* the Scottish Parliament under ordinary judicial review principles. The Attorney General for Northern Ireland and counsel for the Department of Finance and Personnel (Northern Ireland) appeared as interveners in those proceedings. The Supreme Court considered that the Northern Ireland Act was effectively identical to the Scottish Act. Thus, no sustainable argument can be presented that the somewhat different wording of the Northern Ireland Act produces a different outcome from that produced by the Scottish Act.

[17] Lord Brown at paragraph [82] in AXA explained the effect of the legislation thus:

> "It is not as if Parliament had declared, rather than that asymptomatic physical changes constitute actual bodily harm, that any substantial proven exposure to asbestos fibres to an extent likely to result in their harmful ingestion should be thus actionable. Although the Dean of Faculty for the Appellants suggested that realistically this is the effect of the 2009 Act – pleural plaque themselves being intrinsically harmless and their real significance being their manifestation of substantial exposure to potentially lethal fibres – the existence of demonstrable physical changes seems to me ultimately all important. Beguilingly though the Appellants sought to characterise this legislation as no more than a labelling exercise, its description of asymptomatic pleural plaques as bodily injury being transparently designed to engage the employer's liability insurance, the argument is in fact unsustainable. It cannot be doubted that pleural plaques result from the ingestion of asbestos fibres and essentially what the legislation does is to categorise these undoubted physical changes as actionable bodily injury. It is this characterisation which falls to be contrasted with the common law position as earlier understood and, as I have already suggested, the contrast is not really that extreme."

[18] At paragraph [102] Lord Reed said:

> "Section 2 is concerned with asymptomatic asbestos related pleural thickening and asbestosis. These conditions resemble asymptomatic pleural plaques in that they do not cause impairment of a person's physical condition but signify that the person has ingested asbestos fibres and is therefore at risk of serious disease. As a result, although they are not harmful in themselves, their diagnosis is likely to result in considerable anxiety. Section 2 is in identical terms to Section 1, mutatis mutandis, and removes the common law barrier to the actionability of such conditions while preserving all other aspects of the law governing liability."

[19] At paragraph [6] of his judgment Lord Hope stated:

> "It would, as Lord Rodger of Earlsferry said in Rothwell paragraph [90], make no sense, if the plaques themselves are not a condition for which the law will intervene to give damages because it is not serious enough to require

> its intervention, for the law to give damages for anxiety associated with plaques. Furthermore, the anxiety is not about any risk to health caused by the plaques themselves rather it is because these individuals are worried that they may develop asbestosis or mesothelioma as a result of the accumulation of fibres in their lungs. To give them a claim for damages for this will be to give them a claim for something that the plaques themselves did not cause. So the mere risk that they may develop asbestos or mesothelioma in the future will not give them a claim for damages. For them to recover damages for the associated anxiety, the asbestos related pleural plaques themselves must be actionable."

[20] As Lord Hope pointed out in paragraph [5] pleural plaques can be said to be a marker of increased risk. Individuals who have been diagnosed with pleural plaques are liable to become alarmed and anxious for the future. In some cases this may bring to mind the suffering and perhaps death of friends and colleagues from asbestos related diseases. Their enjoyment and quality of life may be severely reduced by the associated anxiety. This anxiety becomes compensatable if the pleural plaques constituted compensatable harm but they were not compensatable under the reasoning in Rothwell because there was no physical harm sustained by the presence of the pleural plaques themselves. From the point of view of the person with diagnosed pleural plaques the significant aspect of the claim must arise from the anxiety generated.

[21] The statute reverses the legal conclusion that the asymptomatic pleural plaques do not constitute compensatable harm and are to be treated as a negligible and *de minimis* injury. This opens the door to anxiety damages. The statute, however, says nothing about the quantification of damages for the physical harm now deemed to be caused by the pleural plaques.

[22] Following Rothwell the new edition of the Green Book under the chairmanship of Higgins LJ removed guidelines for asymptomatic pleural plaques. Following the coming into effect of the new Act the Committee when reviewing the ranges of damages for the updated guidelines felt that in the absence of the kind of reasoned argument and analysis of which this court has had the benefit it should not specify an appropriate range of damages for asymptomatic pleural plaques. It concluded that:

> "Pending any judicial determination of the correct level of damages in relation to such claims consequent on the passing of the 2011 Act the Committee concluded that it would be premature to propose to set out the appropriate levels of awards in relation to that condition."

[23] While the effect of the 2011 Act is to require a finding that the pleural plaques constitute a more than *de minimis* physical injury which causes compensatable harm it does not define the nature and extent of the harmfulness. The terminology as used in some of the Northern Ireland case law pre-Rothwell that the injury was a "significant bodily harm" with "grave consequences" reflected a flawed understanding of the condition, as demonstrated by the House of Lords analysis in Rothwell. The false premise that a significant bodily injury had been sustained by reason of the development of the plaques led in turn to the unsustainable conclusion that it had to be reflected in a not insubstantial award of damages. The line of reasoning in Bittles and Phillips that the Green Book range of £5,000-£10,000 must have included an element of anxiety and distress because the condition on its own, undiagnosed and unknown could not justify an award within that range, accords more closely to the Rothwell analysis of the actual condition.

[24] The starting point in any quantification of damages should be a valuation of the physical injury which by statute is deemed to create compensatable harm. To that must be added damages for the anxiety and distress created by the knowledge of the presence of the condition. While the level of compensatable harm is sufficient to trigger an award of damages the injury itself cannot be described as significant on its own. Its significance and thus the amount of compensation will be influenced, in the main, by the extent of the anxiety and distress engendered. In the case of a deceased person who was never aware of the condition and who thus suffered no distress on that count the award must be a very modest one.

[25] While in Weir the court concluded that it would be difficult and possibly misleading to compare compensation for this type of condition without other categories of injury any award of damages must be proportionate and some assistance can be gleaned from looking at the levels of other awards particularly in the context of lung injuries or scarring injuries, bearing in mind that pleural plaques represent a kind of internal scarring on the surface of the lungs. Trivial scarring can attract damages of the order of £1,000 upwards. Mild respiratory conditions (which subject a plaintiff inevitably to some actual discomfort unlike asymptomatic plaques) may attract awards of up £7,500. Smoke inhalation (again generating some discomfort to the plaintiff) generates awards from £5,000 upwards depending on the gravity of the effect on the lungs.

[26] We reach the conclusion that, taken on their own, asymptomatic pleural plaques would justify an award in the region of £3,000.

[27] In the ordinary course of events the receipt of a diagnosis of pleural plaques, properly explained to the patient, will cause, at least initially, considerable distress, anxiety and alarm. The evidence in this case led the judge to conclude that the deceased did suffer from anxiety which is understandable in the light of his knowledge of other persons exposed to asbestos and his appreciation of the problems of asthma from which his wife suffered. In the case of the deceased the

period of anxiety was relatively short for reasons unconnected to his exposure to asbestos and the assessment of damages must take account of the period of distress. In the ordinary course of events, it will be in the period immediately after the diagnosis that the shock anxiety, distress and alarm would be most intensely felt and, in the absence of subsequent medical scares, plaintiffs will in many cases begin to live with the diagnosis and try to put the matter to the back of their mind. Each case will of course be fact specific and dependant on the individual's response to the situation. However it is unlikely that any case of distress and anxiety caused by a diagnosis of pleural plaques, absent some evidence of grave psychiatric sequelae, will recover outside the bracket of £5,000 - £15,000 however long the stress or anxiety lingers on.

[28] While the award in this case was very much at the top end of the range of permissible awards we cannot say that the trial judge's assessment has resulted in an award so far outside the permissible range that this court should intervene.

Costs

[29] The appellant challenged the judge's decision to award costs in the High Court scale arguing that the value of the claim clearly fell within the County Court jurisdiction. In his ruling on the question the trial judge stated the special reasons why he had decided to award High Court damages. He took account of the fact that the appellants had raised the unsustainable argument that the Northern Ireland statute failed to be construed differently from the Scottish Act. The case was the first opportunity for the courts to speak on the issue of the measure of damages following the 2011 Act and its abrogation of the approach adopted in Rothwell. The case was in the nature of a test case.

[28] The trial judge had a discretionary power, for special reasons shown, to award High Court costs. We see nothing in the judge's reasoning to show that he misdirected himself in the exercise of his discretion. This was an important case raising issues of some complexity and it merited a hearing in the High Court. Accordingly, we reject this ground of appeal.