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Judgment: approved by the Court for handing down | *Delivered:* **27/6/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NOTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2012 No. 75945

BETWEEN:

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

Plaintiff;

-and-

HARLAND AND WOLFF PLC
AND
ROYAL MAIL GROUP LIMITED

Defendants.

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O'HARA J

Introduction

[1] The issue in this quantum only case is the value of a claim for pleural plaques following the decision of the House of Lords in Johnston v NEI and Rothwell v Chemical Engineering [2007] UKHL 39 and the subsequent passage by the Northern Ireland Assembly of the Damages (Asbestos-Related Conditions) Act (NI) 2011.

Factual background

[2] The plaintiff is the widow of William Henry (Harry) McCauley who was born on 9 October 1938 and who died on 20 February 2013 aged 74 years. He worked for the first defendant from about 1955 to 1961 and for the second defendant from about 1964 to 1980. It is admitted by both defendants that during his employment with them he was exposed to asbestos. Mr McCauley went on in 1980 to join the RUC in which he served until 2001. His death in 2013 was as a result of multiple organ

failure following cardiomyopathy, a disease of the heart muscle. It is agreed that his death was not in any way as a result of an asbestos related condition.

[3] Pleural plaques first appeared on a chest x-ray taken of Mr McCauley on 2 September 1991. In a reply to a notice for particulars dated 22 November 2013 it was stated that Mr McCauley was only informed of the diagnosis on 10 February 2012, some 20 years later and just one year before his death. (That pleading may be correct though it sits a little uneasily with a letter sent by Dr Varghese a consultant physician to Mr McCauley's general practitioner on 13 May 1997.)

[4] Pleural plaques were described in the following terms by Lord Hoffmann in his judgment in Johnston v NEI at paragraph [1]:

> "These are areas of fibrous thickening of the pleural membrane which surrounds the lungs. Save in very exceptional cases they cause no symptoms. Nor do they cause other asbestos-related diseases. But they signal the presence in the lungs and pleura of asbestos fibres which may independently cause life-threatening or fatal diseases such as asbestos or mesothelioma. In consequence a diagnosis of pleural plaques may cause the patient to contemplate his future with anxiety or even suffer clinical depression."

[5] In the present case it was agreed by Mr Keenan QC who appeared with Mr John O'Hare for the plaintiff that Mr McCauley suffered no symptoms as a result of his pleural plaques. In her brief evidence the plaintiff said that when her husband was made aware of the diagnosis it caused him some anxiety and stress, more than his heart condition she suggested. This was because she herself suffered from asthma and he did not like what he saw of the effect which that condition had on her. He was also anxious because he personally knew one man and also knew of others who had died from asbestos related conditions. While that evidence is perfectly understandable it was conceded on behalf of the plaintiff that any anxiety or stress which Mr McCauley suffered before his death as a result of the diagnosis of pleural plaques did not amount to any identified psychiatric condition.

[6] Mr G Simpson QC appeared with Mr Michael Maxwell for the first defendant. His submissions were adopted by Mr S Smyth who appeared for the second defendant. Mr Simpson made the point that there is no evidence from the deceased's medical records that he complained to his general practitioner about stress or anxiety. That is certainly correct but the plaintiff said that her husband was not a complainer and that he had to be dragged to the doctor.

Case law and statute

[7] I have been referred by counsel to a series of Northern Ireland cases in which awards of damages have been made for pleural plaques. They include Weir v Harland and Wolff, a judgment of Kerr J dated 31 January 2002. The plaintiff was the widow of a shipyard worker who had been employed there for more than 40 years. He was exposed to asbestos during his employment and developed pleural plaques and asbestosis as a result. However he never knew that he suffered from either condition because he died of an unrelated brain haemorrhage at the age of 70. The pleural plaques and asbestosis were only discovered on autopsy after his death. As in the present case no symptoms were attributed to the pleural plaques (or to the asbestosis for that matter).

[8] At the time of this judgment in 2002 there were 1997 compensation guidelines which suggested that the value of a claim for pleural plaques was in the region of £5,000-£10,000. There was a debate on which judicial opinion was divided as to whether those figures included some element of compensation for distress at the prospect that life-threatening or fatal diseases might develop from the presence of asbestosis fibres in the lungs and pleura. Kerr J said:

> "It is, I believe, difficult – and can be misleading – to compare compensation for this type of condition with other categories of injury. The existence of pleural plaques is a significant bodily injury, in my opinion. It is a condition not to be lightly disregarded, even if the 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. The alteration in the body's integrity brought about by the development of pleural plaques (and even more seriously, asbestosis) must be reflected in a not insubstantial award of damages, in my view. Ignorance of the condition does not alter the intrinsic nature of these grave consequences although, obviously, the award of damages will be commensurately higher if the plaintiff knows of it and is subject to prolonged worry or anxiety as a result.
>
> As I have said, anxiety is an inevitable concomitant of discovery that one suffers from an asbestos-related condition. Since the range of compensation suggested in the 1997 Guidelines covers, in my opinion, only those cases where there has not been an overlay of prolonged anxiety or worry, I consider that the deceased's case is to be evaluated by reference to that range. It must lie at the lower end or below that range however since, not only was the deceased

> unaware of his condition, there is not in his case any future period to be compensated."

[9] Kerr J then went on to accept that the 1997 guidelines should be updated by reference to the change in the relate price index from January 1997 when the Guidelines were published to December 2001 when the case was heard. This changed the range of awards to £5,615-£11,230. On the basis that the guidelines were only intended to be a rough guide he decided to award £5,000 for that aspect of the plaintiff's claim.

[10] Counsel also referred me to the decision of Gillen J in Phillips v Harland and Wolff, unreported 27 June 2000. This is another widow's claim arising from her husband's exposure to asbestos, this time over a period of about 12-13 years. Mr Phillips died on 31 March 1995 of lung cancer unrelated to asbestos exposure. He was found on autopsy to have pleural plaques but, once again, they were asymptomatic. Unlike Kerr J in Weir, Gillen J found that the guideline figures of £5,000-£10,000 did include some element for the upset and worry which would normally accompany pleural plaques. He further found that there was some liability on the part of the defendant for the deceased having been wrongly informed by a nurse in or about November 1994 that he had asbestosis which added to his stress and concern in the last 4-5 months of his life (though only in a "comparatively mild" way). An award of £5,000 was made in that case.

[11] It is significant that in Phillips, Gillen J specifically rejected a submission by the defendant that the actionable injury suffered by the deceased came within the principle *de minimis non curat lex*. The argument on behalf of the defendant was that since the pleural plaques caused no symptoms and did not contribute to the death, no compensation should be awarded. Gillen J held that "physiological damage" had been caused to the deceased which was sufficiently significant to cause damage leading to compensation.

[12] From the Northern Ireland case law, which extends beyond the cases of Weir and Philips, it is clear that until the early 2000s damages were being awarded for pleural plaques, even in cases of asymptomatic pleural plaques, where the deceased was unaware of their presence. That changed however in 2007 on foot of the unanimous decision of the House of Lords in Johnston v NIE and Rothwell v Chemical Insulating. In his judgment at paragraph [2] Lord Hoffman said:

> "Proof of damage is an essential element in a claim of negligence and in my opinion the symptomless plaques are not compensatable damage. Neither do the risk of future illness or anxiety about the possibility of that risk materialising amount to damage for the purpose of creating a cause of action, although the law allows both to be taken into account in computing the loss suffered by someone who has

> actually suffered some compensatable physical injury and therefore has a cause of action. In the absence of such compensatable injury, however, there is no cause of action under which damages may be claimed and therefore no computation of loss in which the risk and anxiety may be taken into account. It follows that in my opinion the development of pleural plaques, whether or not associated with the risk of future disease and anxiety about the future, is not actionable injury."

[13] At paragraph [7] Lord Hoffmann continued:

> "Some causes of action arise without proof of damage. Trespass and breach of contract are examples. Proof of the trespass or a breach of contract is enough to found a cause of action. If no actual damage is proved, the claimant is entitled to nominal damages. But a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability."

He then went on at paragraph [11] to describe as "unassailable" the following finding of fact made by the trial judge which he had set out at paragraph [10]:

> "I start by rejecting any notion that pleural plaques per se can found a cause of action. I am not satisfied that for forensic purposes they can be characterised as a 'disease' nor as an 'impairment of physical condition'. This whole forensic exercise arises because for practical purposes there is no disease, nor is there any impairment of physical condition. If I am wrong, then, the expert evidence as to their significance points (as is in effect conceded) to them being regarded as 'de minimis'. I do not think that that status can be enhanced by associating with such the risk of onset of asbestos related symptomatic conditions as arise not from the plaques per se but from the history starting with the initial exposure – still less do I think that that status can be altered by

> invoking an anxiety arising out of the now articulated risks."

[14] Lord Hope gave a judgment along similar lines. At paragraph [47] he said the following about the de minimis test:

> "It is well settled in cases where a wrongful act has caused personal injury there is no cause of action if the damage suffered was negligible. In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the cost of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and are not negligible. But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless."

[15] This judgment brought to an end throughout the United Kingdom all claims for damages for pleural plaques in which, as is usually the case, the plaintiff (or the deceased) had no symptoms. That remains the case in England and Wales but not in Scotland or Northern Ireland as a result of legislation which has been passed by the Scottish Parliament and by the Northern Ireland Assembly.

[16] The Scottish Parliament acted first and passed the Damages (Asbestos Related Conditions) (Scotland) Act 2009. It provides as follows at Section 1:

> "(1) Asbestos-related pleural plaques are a personal injury which is not negligible.
>
> (2) Accordingly, they constitute actionable harm for the purposes of an action of damages for personal injuries.
>
> (3) Any rule of law the effect of which is that asbestos-related pleural plaques do not

constitute actionable harm ceases to apply to the extent it has that effect."

The Northern Ireland legislation followed two years later in terms which are similar but not identical at Section 1:

> "(1) Asbestos related pleural plaques are a personal injury which constitutes actionable 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 that has that effect."

[17] In effect both statutes make pleural plaques a statutory injury so that any person who has been exposed to asbestos as a result of a tort can now recover damages. It was accepted by counsel that the intention of the legislation is to reverse the effect of the Johnston/Rothwell decision that any such claim failed for lack of damage. The question in the present case is how damages are to be assessed and how the Northern Ireland Act is to be interpreted and applied in light of the Johnston/Rothwell decision and in light of the different wording of the earlier Scottish Act.

Submissions

[18] Mr Simpson for the defendant accepted that the effect of the 2011 Act is to reverse by statute the Johnston/Rothwell decision that asymptomatic pleural plaques is not an injury. He further accepted that anxiety can now be taken into consideration. His primary contentions on quantum were:

(i) That "de minimis" is or can be a defence to a claim notwithstanding the 2011 Act, especially by reference to Lord Hope's judgment.

(ii) That the 2011 Act does not restore the pre-2007 Northern Ireland authorities on assessing quantum.

(iii) That an approach such as that of Kerr J in Weir that pleural plaques is a "significant bodily injury" is no longer tenable.

(iv) That the current Northern Ireland Guidelines on assessment of damages deliberately omit any guidelines for valuing pleural plaques.

[19] On the de minimis issue Mr Simpson contrasted the 2009 Act in Scotland which states at Section 1(1) that pleural plaques are a personal injury "which is not

negligible" with the 2011 Northern Ireland wording which is different and which does not include "not negligible". He submitted that I should interpret this to mean that while de minimis does not arise in Scottish cases it may arise in cases in Northern Ireland.

[20] Mr Keenan for the plaintiff contended that since pleural plaques are now an injury under statute, the only issue is the quantification of damages for that injury. He submitted that while the wording of the two Acts is not identical, the intention is the same i.e. to reverse the effect of the Johnston/Rothwell decision. In effect, he said, the 2011 Act re-opens the door which had been closed by the House of Lords. Once that door has been opened it is entirely appropriate to look back to the pre-2007 decisions and follow their lead on quantum unless there is a compelling reason not to do so.

[21] The contrast between the submissions can be illustrated by reference to a hypothetical example suggested by Mr Simpson. Suppose a man has a chest x-ray which shows pleural plaques but dies in an accident before he is informed of that fact. Mr Simpson submitted that the man's estate would have no claim at all because while he had an injury according to the 2011 Act it was one which he never knew about. In these circumstances his claim must fail on its facts, either in its own right or on the de minimis principle. Mr Keenan submitted that a claim in those circumstances would succeed, if only to a modest degree, because of the fact that his body had a personal injury as defined in the Act or a "bodily insult" as Mr Keenan described it. Mr Simpson submitted in reply that in light of Johnston/Rothwell it cannot be said any longer that there is a "bodily insult" in these circumstances.

Decision

[22] While I acknowledge the difference between the wording found in the Scottish and Northern Ireland statutes I am unable to attribute the significance to the words "not negligible" which is urged on me by the defendants. As Lord Hoffmann said, "save in very exceptional cases" pleural plaques cause no symptoms. That being so, the 2011 Act in this jurisdiction would fail to reverse the effect of the Johnston/Rothwell decision in very many cases if I gave it the narrow interpretation contended for by the defendants.

[23] I am also wary, in the absence of compelling evidence, of drawing a significant distinction between the wording of statutes passed by two different legislative bodies in different jurisdictions when each piece of legislation is intended to reverse the effect of the House of Lords decision. Reading Section 1(1) and (2) of the 2011 Act together, I conclude that pleural plaques is now a statutory personal injury for which damages can and should be awarded if the plaintiff proves fault against the defendant.

[24] I also conclude that in these general circumstances the application of de minimis principle must be doubted because it would apply, potentially at least, to

such a very high proportion of claims for pleural plaques. It has not been suggested to me why the Northern Ireland Assembly would introduce legislation to reverse the House of Lords decision but then exclude from the ambit of that legislation the great majority of cases which had previously been allowed.

[25] The present position is that there are no Northern Ireland guidelines on the assessment of damages for pleural plaques. The introductory foreword to the latest guidelines which were published on 4 March 2013 states:

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

Mr Simpson has submitted that on any approach the present case even if it is not subject to the de minimis principle is a small one. Mr Keenan has referred me to the earlier guidelines which at one point had the range of values at between £5,000 and £10,000. That range was changed in 2002 to a range of £5,000 to £15,000 if there was no functional impairment but with additional damages if there was prolonged anxiety or worry. By reference to the changes in the retail price index Mr Keenan submitted that the range might now be regarded as between £7,350 and £22,050. He suggested that the claim must be above the bottom level because the deceased knew of the diagnosis of pleural plaques but it would not approach a level consistent with prolonged anxiety due to the death of Mr McCauley a little over a year later.

[26] As I have already said, the death of the plaintiff's husband was not attributable to any asbestos related condition. Unfortunately his cardiomyopathy led to other problems of greater significance than pleural plaques. Nevertheless the knowledge that he had pleural plaques and his awareness of deaths from asbestos related conditions must have caused him some stress and anxiety. I accept that this is not referred to in his medical records but I do not find that in any way surprising for the reasons given by the plaintiff which I accept.

[27] In light of my analysis of the intention and effect of the 2011 Act I do not see any reason not to revert to using the earlier guidelines on quantum while allowing some increase in the range by reference to the changes in the retail price index. In all the circumstances I award £10,000 with interest at 2% from 5 July 2012 when the writ was issued. The defendants have a sharing agreement which obviates the need to assess the relevant liabilities of the defendants. Accordingly the award is made against both defendants.