

OUTER HOUSE, COURT OF SESSION

[2016] CSOH 49

PD1815/14

OPINION OF LORD BOYD OF DUNCANSBY

In the cause

ROGER HARRIS

Pursuer;

against

THE ADVOCATE GENERAL AS REPRESENTING THE MINISTRY OF DEFENCE

Defender:

Pursuer: Di Rollo QC, Thomson; Digby Brown LLP
Defender: Primrose QC, Olson; Morton Fraser

31 March 2016

[1] This is an action of reparation. The pursuer was employed by the Ministry of Defence as a boiler maker from 1961 to 1977. During the period of his employment with the defender he was exposed to asbestos dust and fibres as a result of which he has developed bilateral calcified pleural plaques. The defenders admit liability. The matter came before me for a proof on quantum. However the evidence was agreed and set out in a joint minute. Accordingly I heard no evidence but submissions on the quantum of damages.

The joint minute

[2] The relevant parts of the joint minute are as follows:

> "1. The pursuer was employed by the defender as a boiler maker from 1961 until 1977.
>
> 2. During the period of his employment with the defender, the pursuer was exposed to asbestos dust and fibres.
>
> 3. The asbestos exposure was negligent and in breach of duties owed by the defender to the pursuer at common law and under statute.

4. In consequence of said exposure, the pursuer has developed bilateral calcified pleural plaques. The pleural plaques were diagnosed on 8 January 2013. There are pleural plaques in the left upper zone and one on the right diaphragm.

5. The defender is liable to make reparation to the pursuer for the loss injury and damage sustained by him as a result of the asbestos exposure.

6. The pursuer's evidence is contained in his affidavit no 20 of process.

7. The pursuer was examined by Dr AJ Dorward, MB ChB, FRCP (Glas & Edin) FRCP (Edin) Consultant Physician (Consultant Physician in Respiratory and General Medicine at the Royal Alexandria Hospital) at Ross Hall Hospital on 14 May 2014.

8. Dr Dorward took the following history – The pursuer is 70 years of age and keeps well. He has never smoked and has not drunk alcohol since the age of 30. He has suffers from dyspepsia and hypertension, which are well controlled. He has suffered from hypertension since the age of 30. He has been diagnosed as having a hiatus hernia. He is prescribed Atenolol, Amlodopine and Lansoprazole. He is not short of breath, other than when climbing hills and stairs. He had a cough intermittently between January 2014 and 14 May 2014 and saw his GP about it. The cough is not productive now. He has never smoked and has not drunk alcohol since the age of 30. He lives with his wife and daughter.

9. On clinical examination Dr Dorward found that the pursuer looked well and looked younger than his 68 years. He had no finger clubbing, heart sounds were normal, his chest was clear and there were no crackles.

10. The occupational history of the pursuer in that he worked in the Royal Navy Devonport and then was transferred to Rosyth. He worked as a boiler maker to trade. The pursuer worked around asbestos lagging, repairing it and there was asbestos dust in the air. No masks were supplied. The pursuer's uncle died of pulmonary asbestos shortly before the examination. The pursuer's uncle had worked alongside him at Devonport. The uncle's death precipitated the pursuer having a chest X-ray. This showed pleural plaques in the left upper zone and one on the right diaphragm.

11. The pursuer was found to have bilateral pleural plaques which are typical of those caused by asbestos exposure in the distant past. His history is typical of those who have been exposed to asbestos who develop pleural plaques many years from exposure. The pleural plaques are due to his employment with the defenders at Devonport and Rosyth dockyards where he was a boiler maker.

12. Pleural plaques are a marker for asbestos exposure, they are not malignant and are unlikely to cause him problems in the future. The do not cause breathlessness. They do not affect his lifestyle.

13. The pursuer through the fault of the defender has had asbestos exposure enough to cause pleural plaques. He has an increased risk of developing pleural mesothelioma in his lifetime of five per cent. He has in addition an increased risk of 0.2 per cent of developing asbestos related lung cancer. Both mesothelioma and asbestos-related lung cancer are terminal conditions.

14. Should the pursuer develop mesothelioma or lung cancer, it is unlikely that he would survive more than 10 months from the date of diagnosis.

17. In the event that the pursuer develops pleural mesothelioma, the value of *solatium* would be £66,000 (sixty six thousand pounds sterling) if an award was made today. A similar sum for solatium would be awarded in respect of asbestos related lung cancer.

18. In the event that the pursuer develops pleural mesothelioma, the value of services provided in terms of section 8 of the Administration of Justice Act 1982 would be £13,500 (thirteen thousand five hundred pounds sterling) if an award was made today. A similar sum for services would be awarded in respect of asbestos related lung cancer.

19. The pursuer is in receipt of the following pensions: (i) a civil service pension in the sum of £79.83 per calendar month; (ii) a state pension in the sum of £571 per calendar month; and (iii) a pension with BP Pensions Ltd in the sum of £713.23 per calendar month. In total, the pursuer receives £16,369 per annum in pension payments."

Submissions for the pursuer

[3] The pursuer's valuation is set out below:

Head of Claim	**Components**	**Valuation**
Solatium Range in Wales 5,500 - 9000	1/2 to the past	£7,500
Interest on past *solatium* From 8/01/2013 to date (20/10/15)	4%	£417

Damages in respect of future risks: 5% chance of developing mesothelioma **and** .02% chance of developing asbestos related lung cancer (5.2%)	<u>Solatium</u> Agreed £66,000 x 5.2% = **<u>£3,432</u>** <u>Lost years</u> Age 70; table 1 multiplier = 17.32. Round down to 17. Assume death at mid-point, years, at age 78.5 years Net annual pension = £16,369 (MOD £79.83 pcm; state pension £571 pcm; BP £713.23 pcm); x 7.66 (term certain halfway between 8 and 9 years, table 28) = £125,387 Less 25% deduction in terms of s1 of the 2011 Act = £94,040 for lost years x 5.2% risk = **<u>£4,890</u>** <u>Services</u> £13,500 x 5.2% risk = £**<u>702</u>** Solatium 3,432 Lost years 4,890 Service 702 TOTAL 9024 9024 X x 0.8107 for early payment (Table 27)	£7,316

	=£7,316	
Total damages in full and final settlement		**£15,233**

Mr Di Rollo moved me to grant decree in the sum of £15,233 in accordance with the valuation. He reminded me that in this case the pursuer was seeking a sum in full and final settlement of his claim for damages. This was not a case in which the pursuer was looking for provisional damages with the right to return to the court if he developed either pleural mesothelioma or lung cancer. The agreed evidence was that the pursuer had an increased risk of developing pleural mesothelioma of 5% and a 0.2% risk of developing asbestos related lung cancer in the course of his lifetime. Accordingly Mr Di Rollo submitted that the correct approach was to look at what the claim would be worth if it was settled on the basis of an award of provisional damages and add to it a sum equal to 5.2% of the value of the claim were he to go on to develop pleural mesothelioma or asbestos related lung cancer. In respect of either pleural mesothelioma or lung cancer the parties were agreed that the value of the solatium would be £66,000 if an award was made today. Accordingly there should be an award of solatium in respect of future risks of £3,432 being 5.2% of £66,000.

[4] The starting point was to look at what the appropriate sum for solatium was for somebody who had developed bilateral calcified pleural plaques. Mr Di Rollo submitted that the range was between £5,500 and £9,000; *W* v *Advocate General for Scotland* 2015 SLT 537. In *W* v *Advocate General for Scotland* Lord Pentland had considered the appropriate award for provisional damages in respect of an individual who had developed pleural plaques. Lord Pentland reviewed the authorities and in particular the recent case of *McCauley* v *Harland and Wolff Plc* 2015 NICA 28. In *W* the pursuer was 69 years of age and had a normal life expectancy. However, Lord Pentland accepted that he had a greater than average level of anxiety at the prospect of developing mesothelioma. While in time he may become less anxious about the possibility of deterioration in his condition nevertheless he considered that this was a case where the pursuer did have a significant anxiety problem. It was likely to persist in the future. The anxiety however did not amount to a serious psychiatric illness or psychological disability. Lord Pentland awarded provisional damages for solatium in the sum of £8,500. Lord Pentland considered that an appropriate award for provision damages for asymptomatic pleural plaques with associated moderate anxiety would be in the region of £5,500 and £9,000. In this case Mr Di Rollo submitted the appropriate starting point would be £7,500 acknowledging that the pursuer in *W* had a greater level of anxiety than the present pursuer. Mr Di Rollo reminded me that the pursuer would be giving up his right to sue in respect of the development of mesothelioma or lung cancer should that occur and referred me to *Aitchison* v *Glasgow City Council* 2010 SC 411. In the pursuer's case his diagnosis was on 8 January 2013. The correct approach was to be found in the dissenting decision of Smith LJ in the *Rothwell* and associated cases in the Court of Appeal in England; *Rothwell* v *Chemical & Insulating Company Ltd* [2006] ICR 1458. Although Smith LJ was the

dissenting judgment the other members of the court agreed that, had there been any liability they would have endorsed the assessment of damages made by Smith LJ (paragraph 104).

[5] Smith LJ commenced his discussion of the quantum of damages that should be awarded at paragraph 148. At paragraphs 151 - 162 he considered the levels of provisional damages before moving on to consider the damages that should be given as final awards. The present case was a similar situation. The pursuer had developed pleural plaques with identified percentage chances of developing mesothelioma and lung cancer. At paragraph 178 Smith LJ said that the courts had to do their best in assessing damages. Claimants should not be penalised if they opt to seek a final award rather than going for provisional damages. There should not be a standard uplift on the provisional damages awards; rather these should be individual assessments based on the risk of developing mesothelioma or lung cancer as appropriate. However the element of the award which reflected future risk should be discounted for accelerated receipt. The only practical way of doing this was to assume that the onset of the disease and/or death will occur about halfway through the remaining span of expected life and to make an appropriate adjustment. Smith LJ had gone on to consider the particular awards in these cases. In the case of a Mr Grieves he had said that the correct approach would be to add 8% of the award for general damages to represent the future risk of developing either mesothelioma or lung cancer. The 8% was calculated on the basis of the assessed risk of developing either of these diseases. That would have to be discounted by the appropriate factor for accelerated receipt. In that connection Mr Di Rollo referred me to Table 27 of Ogden's Tables.

[6] So far as future loss is concerned in Mr Grieves' case Smith LJ would have been prepared to make an award in respect of loss of pension and estimated cost of nursing care in the event that he had developed a malignant disease. Again that would be discounted by the appropriate proportion.

[7] Parties had produced a table of previous awards (referred to as Table 1) on an assessment of full and final damages in asymptomatic pleural plaques. Table 2 referred to Northern Island cases, although it was suggested that the Northern Island cases were not helpful in this case.

[8] So far as this case is concerned Mr Di Rollo referred me to the pursuer's affidavit. That showed that he was aware of the effect that the onset of pleural plaques can have on an individual. A relative had died recently and that brought the anxiety home to him. £7,500 was a reasonable estimate of solatium based on Lord Pentland's assessment in the case of *Wales*. It included an assessment of the physiological changes to the body together with the anxiety and distress that went along with the diagnosis of pleural plaques. The cumulative risk of developing either mesothelioma or asbestos related lung cancer was 5.2%. There was no disagreement between the parties on that issue. The agreed solatium on developing such a disease was £66,000. Accordingly the damages in respect of future risk should be 5.2% of that, namely £3,432. Table 1 for Ogden's Tables showed that for a 70 year old male the multiplier for pecuniary loss for life was 17.32. It would be appropriate to round that down to 17. The midpoint of that figure was 8.5 years. That was a term certain. Table 28 showed the multiplier for pecuniary loss for a term certain at 2.5% as between 7.26 and 8.07, that being the figures for 8 and 9 years respectively. 2.5% was an appropriate figure as that sum could be invested with a return at that level. The discount using Table 27 would be between 0.8207 and 0.8007 ie 0.8107. The net annual pension was £16,369 comprising a Ministry of Defence pension, state pension and BP pension. That sum should be

multiplied by 7.66 in the midway point between 7.26 and 8.07 to give a figure of £125,387. That should be subject to a 25% deduction in terms of section 1 of the 2011 Act making a total of £94,040 for lost years. 5.2% of that was £4,890. The sum for services was £13,500 at full value. Applying the 5.2% risk to that figure gave £702. The total including solatium for future risk at £3,432, lost years at £4,890 and service at £702 came to £9,024. That should be discounted by the figure of 0.8107 giving a figure of £7,316.

[9] Mr Di Rollo emphasised that if the pursuer does go on to develop either mesothelioma or lung cancer he will be substantially undercompensated by having elected to take the full payment at this time. It was the pursuer's discretion as to whether to elect for full and final settlement or to go for provisional damages.

[10] So far as life expectancy was concerned if the defenders contented for a shortened life expectancy there must be averments to that effect. He referred me to *Walker & Walker* in evidence at paragraph 352 for the presumption of life expectancy.

Submissions for the defenders

[11] For the defenders Mr Primrose moved for decree in the sum of £8,996. He accepted that the defenders having elected for final damages in this action as opposed to seeking provisional damages are entitled to obtain compensation for the risk that he may go on to develop another asbestos related condition in the future; *Aitchison* v *Glasgow City Council* 2010 SC 411. The Damages (Asbestos Related Conditions) (Scotland) Act 2009 gave no guidance on how damages should be quantified in such cases. Mr Primrose's central proposition was that there was no need to carry out a two stage exercise for the assessment of solatium; the approach to quantification of damages in *Rothwell* was only one approach. Smith LJ had made it clear that it need not be followed in every case and could be departed from in certain circumstances. Another way there was to adopt a broader approach was simply select a figure for full and final damages based on previous cases where such full and final awards have been made and to update those awarded. Even before *Rothwell* there had been different ways of approaching this question. In some cases courts were content to make lump sum awards for general damages eg *Cowan* v *Kitson Insulations Ltd* [1992] PIQR Q19, *Ellford* v *Ministry of Defence* [1997] CLY 1945. In *Hynes* v *Lobnitz* 2008 Rep LR 98 Lord Carloway approached the matter on a lump sum basis without apparently considering the need for a two stage approach.

[12] In making an assessment it should be borne in mind that pleural plaques is asymptomatic. In the great majority of cases they do not cause any degree of disability whatsoever. In approaching the assessment of final awards of general damages in such cases the exercise is to value the risk of final deterioration in the claimant's health. While it is accepted by the defenders that for the pursuer the increased risks of developing mesothelioma will be felt to be substantial, in courts where the test for whether or not an event is likely to occur is on the balance of probabilities, a 5% chance of something occurring is a very slim possibility. This ought to be reflected in the award. Accordingly the correct way of valuing the award on full and final damages for pleural plaques ought to be to identify a range of values and to see whether in the particular case under consideration it ought to fall within that bracket having regard to the pursuer's age, the level of anxiety that they have about developing a disease and the extent of the risk of future deterioration. The defenders submitted that the correct approach should be to follow the reasoning of Holland J

in *Rothwell* summarised by Smith LJ in the Court of Appeal decision at paragraphs 165 – 167. It should be noted that this was an approach which did not find favour with Smith LJ. The adoption of the arithmetical approach can result in overcompensation. An explanation of why this could occur could be found in *Hindson* v *Pipe House Warf (Swansea) Ltd* [2007] EWHC 273. In that case the judge noted that in addition to 2% risk of pleural thickening, 2% asbestosis, 5% mesothelioma the exposure to asbestos had caused a 15% increase in the risk of lung cancer. That being so there was a 20% increase in the cumulative risk of his suffering a malignant disease due to asbestos exposure. At paragraph 50 Wyn William J gave the reason why a strictly arithmetical approach to the award of general damages in that case would not be appropriate. First there was no more than a remote possibility that the claimant would develop all of the conditions. Secondly, it is necessary that there be some discount to take account of the fact that the claimant is being compensated now for future risks and thirdly the court normally sets its face against identifying separately different injuries assessing the compensation in respect of each of these separate injuries and then aggregating each sum. Rather the approach is to award a global sum to reflect all of the injuries actual or potential.

[13] Mr Primrose referred me to a number of cases on quantification on the full and final basis. These are set out in more detail in the written submissions but included *Nicol* v *Scottish Power Plc* 1988 SLT 822; *Phillips* v *Harland & Wolff* Queen's Bench Division High Court of Northern Island 27 June 2000; *Ellford* v *Ministry of Defence*; *McCarthy* v *Abbot Insulation* [1999] CLY 1539; *Pattenden* v *Miller Insulation Ltd* [2003] CLY 3241; *Hooper* v *Prescott* [2005] 2 QR 22; *Brett* v *Beaven & Sons* [2005] 2 QR 21; *Cowan* v *Kitson Insulations Ltd & Others* 1992 PIQR Q 19; *Mulry* v *William Kenyon & Sons Ltd* 1992 PIQR Q 24; *Horne* v *Prescott (No 1) Ltd* 1999 99(2) QR 6; *McCauley* v *Harland & Wolff Plc & Royal Mail Group Ltd* [2014] NIQB 91; *McCauley* v *Harland & Wolff Plc* 2015 NICA 28; *Weir* v *Harland & Wolff Plc* [2002] NIQB 9. Of these Mr Primrose placed particular reliance on *Hooper* v *Prescott* which was a somewhat analogous case. The claimant was a 71 year old male with a multitude of health conditions and had developed asymptomatic pleural plaques and pleural thickening. He had a 2% risk of pleural thickening or asbestosis sufficient to cause disability and a 2% risk of mesothelioma. His risk of developing lung cancer was increased by 5%. His life expectancy was reduced by three months. He was stoical in nature and concerned about his condition but that concern was not great. The final award at today's value was £7,150.

[14] Turning to the quantification of the claim for financial loss Mr Primrose submitted that the fundamental problem with the pursuer's lost years claim in this case was evidential. There was no evidence whatsoever as to the length of time by which the pursuer's lifespan has been shortened in this case. Accordingly the court could make no finding as to what the duration of any lost years is. There could and should have been an estimate provided either by the pursuer's expert Dr Dorward or an expert in life expectancy. The usual way to estimate a reduction in life expectancy is by mean of reference to statistics; see *Gregg* v *Scott* [2005] UKHL 2. In the Court of Appeal in *Rothwell* in the cases where quantum was considered it was clear that the court was able to apply the scientific or principled approach because evidence about life expectancy seems to have been available. The estimate of a seven year reduction in life expectancy which has been made on behalf of the pursuer in the present case is a gross overestimate and in the absence of any proper evidence about the true reduction in life expectancy it would be entirely wrong for the court to simply accept that there had been a 50% reduction in life expectancy caused by 5% risk of something happening. In his

submission recognising that there was a very small risk of a lost years claim and the absence of any evidence whatsoever in relation to the true reduction in life expectancy the court should award only a nominal sum for this loss. It was suggested that the matter could be approached broadly on the basis of one year's financial loss on a 5% risk. In all the circumstances an award of £600 would be all that the court could properly make.

[15] In summary the quantification for the defenders was as follows; solatium assessed at £7,500 with interest thereon at the rate of 4% since 8 January 2013 £396, future financial loss £600 and nursing services £500 making a total damages of £8,996.

Decision

[16] In the Court of Appeal in the *Rothwell* and related cases Smith LJ examined the methodology for the assessment of general damages in cases where the claimant sought a full and final settlement taking account of future risks. She rejected the approach taken by the judge at first instance and concluded that the appropriate method was what she termed the principled approach. That involved taking the full value figure and applying the appropriate percentage risk and then adding it to the figure that would be awarded for provisional damages.

[17] I do not accept the criticism made of this approach by Mr Primrose. He relied on the comments made by Wyn Williams J in *Hindson* at paragraph 50. *Hindson* had been one of the associated cases in *Rothwell* but was remitted back due to the change in the claimant's medical condition. In the first place it is I think difficult to draw comparisons between this case and the circumstances in *Hindson*. In that case the claimant had a particularly complicated medical history. His life expectancy was reduced due to coronary disease and the fact that he continued to smoke. Indeed there was a relationship between his exposure to asbestos and cigarette smoking in the risk that he would develop lung cancer. Smith LJ said that it was in those sort of circumstances where it might be appropriate to modify the approach (paragraph 179).

[18] Wyn Williams J noted that if one adopted a strictly arithmetical approach it would be possible in *Hindson* to justify an award of £17,000 but he concluded that would be too high. He said that there was no more than a remote possibility that the claimant would develop all of the conditions specified by Dr Rudd, the claimant's medical witness. That is not the position here. In this case the issues not the risk of developing <u>both</u> mesothelioma and lung cancer. It is sufficient that one of these conditions occur. Wyn Williams J also said that it was necessary to apply some discount to take account of the fact that the claimant is now being compensated for future risks. Mr Di Rollo's approach recognises that and takes it into account.

[19] Finally the judge said that the court normally sets its face against assessing the compensation in respect of different injuries and then aggregating the sum. However that is not what is happening in this case. There is one injury but there are different risks. I see nothing wrong in assessing the risks that flow from the one injury and aggregating these provided care is taken not to double count. It is perhaps notable that the sum awarded by Wyn Williams J in *Hindson* was what the claimant sought by way of general damages. I also note that the claimant's counsel, Mr Frank Burton QC was also the counsel for most of the claimants in *Rothwell*.

[20] In my opinion the appropriate approach in this case is to take the approximate full value for each of the two conditions, mesothelioma and lung cancer and apply the appropriate percentage risk to the full value of each condition. As it happens the parties are agreed that the full value

would be £66,000 for solatium in respect of both conditions, the pleural mesothelioma and lung cancer.

[21] It might be thought that taking an aggregate figure of 5.2% gives an overly precise assessment of the future risk. However if one was to round it down to 5% it would in effect mean that there was no assessment being made in respect of the, admittedly very low, risk of developing lung cancer. In any event once one starts using the Ogden Tables one is immediately using very precise actuarial figures. Accordingly I see no difficultly in applying the methodology suggested by Mr Di Rollo.

[22] I start with the assessment of the appropriate award for provisional damages in this case. In *W* Lord Pentland conducted a review of the cases in England and Wales and compared these with the recent Northern Irish cases. He assessed the range for provisional damages in cases such as this as being between £5,500 and £9,000. I agree that that appears to be the appropriate range. The pursuer in *W* was of a similar age to the pursuer in this case with a similar history and with no reduction in life expectancy. However he had an above normal anxiety about the prospect of developing further lung disease. It was not a serious psychiatric illness or psychological disability but Lord Pentland accepted that he had a significant anxiety which would persist for some time into the future. He awarded £8,500. The pursuer's valuation is £7,500. Mr Primrose suggested that that was on the high side and referred me to the case of *Hooper*. I did not find the brief digest report to be of much assistance. Comparing this case with the pursuer in *W* it appears that the only difference is the significant anxiety which the pursuer in *W* experienced. Accordingly I consider that an appropriate award from provisional damages in this case would have been £7,500 as suggested by Mr Di Rollo with interest at the rate of 4% per annum on half that sum from 8 January 2013 to the date of decree. Onto that sum assessed for provisional damages should be added 5.2% of £66,000 ie £3,432.

[23] So far as financial loss is concerned Mr Primrose submitted that there was no evidence of a reduction in life expectance and accordingly the seven year reduction was a gross over estimate. I agree with Mr Di Rollo that this appears to be a misunderstanding of the calculation that is being carried out. In the first place it is not suggested that there is any reduction in life expectancy. Again that is similar to the position of the pursuer in *W*. Secondly the pursuer is entitled to rest on the presumption of normal lifespan; *W*alker & Walker, *The Law of Evidence in Scotland (4th Edition)* at paragraph 3.5.1. The normal life expectancy for a man of the pursuer's age is taken from table 1 multiplier as 17.32 and rounded down to 17.

[24] As Mr Di Rollo recognises the problem with this approach is that it potentially overcompensates because it does not take account of accelerated receipt. Smith LJ in *Rothwell* recognised that this sum should be discounted. She went on that no obviously satisfactory way of doing this is evident.

> "The only practicable way seems to me to assume that the onset of disease and/or death will occur about half way through the remaining span of expected life and approximate adjustment" (paragraph 179, page 1508).

There are no doubt other ways of making this discount but none come to mind. It should be remembered that the resulting calculation is itself discounted to 5.2% of the calculated sum for

future risk. The assumption of death at the midpoint in the pursuer's calculation is not an estimate in the reduction of life expectancy but an assumption made to reflect early receipt.

[25] Parties are agreed on the figures for pension and the sums calculated by the pursuer can be adopted. Parties are also agreed that the value of services provided in terms of section 8 of the Administration of Justice Act 1982 at £13,500 and again the pursuer's calculation can be adopted.

[26] The interest figure on the calculated sum of provisional damages will need to be updated and I will put the case out by order to agree final calculations and to deal with expenses.