



Neutral Citation Number: [2022] EWHC 3004 (KB)

Case No: KB-2022-000950

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 November 2022

Before:

HIS HONOUR JUDGE BLAIR KC
(SITTING AS A JUDGE OF THE HIGH COURT)

Between:

PETER FRANK BROWN	<u>Claimant</u>
- and -	
G & K MANSON LIMITED	<u>Defendant</u>

Daniel Bennett (instructed by **Slater & Gordon Solicitors**) for the **Claimant**
Damian Powell (instructed by **Plexus Law**) for the **Defendant**

Hearing date: 10 November 2022

Approved Judgment

His Honour Judge Blair KC:

Background

1. This judgment concerns the assessment of damages in respect of a claim brought by Mr Peter Brown against his former employers - a limited company which I am informed still exists and is active. Mr Bennett of counsel (instructed by Slater & Gordon Solicitors) appears on his behalf. The defendant company has been represented during the litigation by Plexus Law Solicitors.
2. Shortly before the hearing commenced I was handed a defendant's Skeleton Argument dated 9 November 2022 (thus not complying with paragraph 8 of the Case Management Directions of Master Eastman at the CMC on 28 June 2022, which required it to be filed not less than 4 days before the hearing). It was drafted by Mr Powell of counsel, who attended the hearing. Mr Powell explained that he was not instructed until after the deadline for the filing of skeletons expired.
3. Paragraph 1 of his Skeleton states that Plexus Law has been acting as the Solicitors of an insurance company which acquired the liabilities of an employer's liability insurer who provided the defendant with cover between 28/05/65 and 31/12/68. I was informed that the defendant company has not been co-operating with addressing this litigation and it is not known who, if anyone, insured them for liabilities before that time. Mr Powell has thus been recently instructed on behalf of Catalina Holdings (Bermuda) Limited under their contractual rights of subrogation to step into the shoes of the defendant and challenge the quantum of the claim insofar as it may affect the sums for which they will be liable to indemnify the defendant.
4. The claimant is now aged 74, having been born on 23 August 1948. He worked for the defendant between August 1963 and 1968 on the maintenance of heating systems in the County of Dorsetshire. During the course of his employment he was exposed to asbestos which was used to lag and insulate boilers. As a consequence of that exposure he developed asbestosis and he has brought this claim for damages to compensate him for pain, suffering and his other losses. Judgment on liability was entered against the defendant on 28 June 2022.

The evidence

5. In quantifying the value of this claim I have had the benefit of reading Mr Brown's witness statements dated 3/9/21, 24/6/22 and 12/8/22 (which stood as his evidence-in-chief) and of hearing him under cross-examination. I have also read a statement from his wife - Linda Brown, dated 12/8/22 (which also stood as her evidence-in-chief) and have considered her answers under cross-examination. As to expert evidence, I have read the report of Professor Maskell, a consultant chest physician, dated 10/2/22, and Dr Edey, a consultant thoracic radiologist, dated 31/1/22. Their evidence has not been challenged.
6. An updated Schedule of Loss, dated 28/9/22, was submitted on behalf of the claimant. It has been calculated to include matters up to the day of hearing. It goes somewhat further than the required Schedule of Special Damage ordered by Master Eastman by including a submission as to the appropriate quantum of damages for pain suffering and loss of amenity, but there is no harm in that - it is valuable for the defence to have

such a document so as to understand how the claim is to be pitched in all its different aspects.

7. The only other document served by the defence (apart from the skeleton argument) is a Counter Schedule of Loss dated 26/10/22.
8. Mr Brown was diagnosed with asbestosis disease in October 2019, but he had been beginning to experience the associated symptoms of increasing breathlessness in late 2018 or early 2019. He had unfortunately already suffered from a number of health issues over the preceding years.
9. In the 1980s he was crushed by a bull when working on a farm as head stockman and relief-milker for Lord and Lady Vestey. That accident led to a 14 week period of hospitalisation and the need to wear a corset for 3 years. It left him with problems to his back and his left leg which gave constant pain and flared up from time to time. Treatment for that has been with 6 monthly spinal injections, which he told me gave him some relief for about 3 or 4 months, enabled him to “get about” with the use of a stick and to “tinker about”.
10. It is clear that Mr Brown is a man who strongly values his independence and personal dignity. He did all he could to stay in gainful employment; making a living; caring for his family; and looking after himself.
11. After finishing farm work in the late 1980s he became a lorry driver until the mid-1990s and then undertook general maintenance work, painting and decorating. However, it became increasingly difficult for him to carry out the tasks of being a painter and decorator because of his injuries and he stopped working in 2000/2001 when he was aged about 52.
12. About 10 years ago (2012) Mr Brown was diagnosed with COPD for which he has used a Ventolin inhaler twice a day. Then in 2015 he was found to be suffering from bowel cancer. He explained in his evidence how the doctors found that his lungs were decidedly worse than simply from COPD but they decided to deal with things one at a time, starting with 3 years of treatment for cancer.
13. He was pressed in cross-examination with the proposition that it was his history of other health issues (summarised above) which was the cause of his need for such things as additional care from his wife, assistance with DIY, gardening, cleaning windows, breathing aids and extra heating. His wife was cross-examined to the same effect. Both of them found difficulty in understanding the nuances of some of the questions and did not always answer them directly. However, I am completely satisfied that this was not as a result of any dishonesty, exaggeration or deliberate avoidance on their parts. They were being asked to remember back to phases of the claimant’s state of health over the past two decades (and before) with an unrealistic level of expected precision in their recall of what help was needed, when, and to what extent. Attempts to contrast subtle changes of wording between Mr Brown’s three statements, and between them and that of his wife, were lost on them; not because they had been caught-out with material inconsistencies, but because they were honest witnesses who could not see that the forensic differences being suggested to them were in the slightest part significant.

14. I found them to be a couple who were doing their best to describe how their lives had been additionally affected by the onset of Mr Brown's much more acute and debilitating breathlessness. They appropriately conceded that Mr Brown had indeed had flare-ups of his back and leg injuries from time to time which made him temporarily dependent on his wife and others for various tasks while it lasted, but the onset of his symptoms of this disease had made those dependencies constant and permanent. As for the effects of his COPD, I accept his evidence that he had previously been able to carry on doing what he was wanting to do with the use of a Ventolin inhaler and taking a rest to catch his breath.
15. Professor Maskell quantified the claimant's respiratory disability in 2019 at 45%, of which 20% was due to the asbestosis. This had increased to a disability of 55% by February 2022, of which 25% was due to the asbestosis. He predicts the disability caused by the asbestosis related diseases are likely to progress by a further 5% during Mr Brown's lifetime, to 30%. He considers that there is a loss of life expectancy of 4 months. These are the matters I am asked to quantify in an award of provisional damages. (He has identified other future risks: mesothelioma, lung cancer and pleural thickening, for which the asbestosis would be a contributor, but those can be addressed at a later date if they become a reality.)

My findings

16. My findings about the effects of the asbestosis on Mr Brown's day-to-day activities are set out in the paragraphs which follow. In all its main elements I accept the submissions made on behalf of the claimant (subject to a recalculation of the hourly rate for gratuitous care and assistance).
17. The defence has suggested that the gratuitous care and assistance claims are exaggerated. Also, that to the extent he does receive gratuitous care and assistance, and insofar as he now uses more heating, has purchased aids for his breathing, and travels to hospital for regular check-ups, they all arise from his pre-existing health difficulties. Accordingly they argue that causation has not been established. They challenge whether he even needs the aids he has acquired for asbestosis and complain that he has not inquired whether he may have them paid for by the NHS.
18. I reject those submissions. I accept that the debilitating breathlessness which he began to suffer from early 2019 from asbestosis has resulted in his wife undertaking an additional daily hour of assistance. This includes his washing, drying, dressing and personal grooming, and in having to do domestic tasks without the assistance he used to provide.
19. I also accept that he has lost the ability to do 30 hours of gardening per annum which others now have to undertake on his behalf. This is a very modest claim of less than an hour per week and reinforces my assessment of his credibility in not exaggerating his loss.
20. In the same way he seeks 20 hours per annum for DIY jobs and 6 hours per annum for window cleaning which he used to do himself. These are modest and entirely reasonable assessments.

21. A dispute has arisen as to the appropriate quantification of an hourly rate in respect of the above claims. The assessment put forward on behalf of the claimant in his Updated Schedule of Loss took as its hourly rate the 'aggregate rate' in the table set out in 'Chapter K1: Care and attendance' from the Professional Negligence Bar Association's Facts & Figures book for 2022/23 (Sweet & Maxwell). Any such award has to be discounted by 25% so as to reflect the gratuitous nature of the care and assistance provided.
22. Mr Powell argues that if, as the claimant proposed and the defence do not challenge, the table in chapter K1 is used, then the 'aggregate rate' is not the appropriate one to take. He proposes that the basic rate should be taken because the care and assistance will (for the most part) be undertaken during working weekday hours. Mr Bennett then argued that the guidance in 'Chapter K3: DIY, gardening and housekeeping' would be appropriate for these claims, which rates are considerably higher.
23. I consider that for the level of care and assistance required and the times when it will mostly be provided it is most appropriately quantified for the facts of this case by reference to the basic rate on Spinal Point 2 of the National Joint Council Payscales (i.e. in Chapter K1 for weekday daytime hours). To this extent only I accept the submissions of the defence.
24. Mr Brown's ongoing check-ups at Basingstoke hospital are for his asbestosis and take place four times per year, requiring an additional 144 miles of car journeys each year. He claims £50 per annum (which is less than £0.35 per mile), which I consider entirely reasonable.
25. Because the claimant is now forced to conduct a sedentary lifestyle he finds himself inactive within the home for very much longer than he did. He finds himself feeling cold through the loss of body heat and this requires his domestic heating to be on for longer so as to keep warm. He assessed this at an extra £100 per annum until the end of March 2021; then at an extra £150 per annum, but from now onwards at an extra £200 per annum, due to the energy price cap increases. I accept these as reasonable assessments and allow those aspects of his claim.
26. He claims for some aids and equipment which have been purchased to assist his symptoms and for the ongoing purchase of oxygen canisters. These include a portable oxygen concentrator and a dehumidifier. The defence argument that there is nothing to substantiate his need of them is rejected. I do not find that the actions of the claimant were unreasonable, in fact quite the contrary – they were perfectly reasonable. In *Najib* [2011] EWHC 1016 QB Nicola Davies, J. (as she then was) permitted an award in respect of private treatment for alternative therapies which were unproven and untested (see paragraph 20). These modest items of expenditure appear to me to be entirely mainstream and referable to seeking to alleviate his symptoms from his additional disability occasioned by asbestosis. As for the defence argument that the claimant should have tried to mitigate these alleged losses by asking the NHS to provide them, it flies in the face of section 2(4) of the Law Reform (Personal Injuries) Act 1948 (as amended):

“In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the

possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 2006...”

General Damages

27. I have been addressed on the quantification of general damages by reference to section 6(C) of the Judicial College Guidelines (16th edition, 2022), the following cases which concerned awards of provisional damages: *Godfrey* (1999) WL 35808823; *Bourne* (2010) WL 11664652; *Holmes-More* (2000) WL 36740466; *Johnson* (1997) WL 35428863, and the following cases which concerned full and final awards: *Blair* (2002) WL 35650505; *Sutcliffe* (1997) WL 35428965; and *Hughes* (2003) WL 27386363.
28. If the Judicial College’s bracket of £35,500 - £105,850 were to be sub-divided into lower, middle and higher bands they would be as follows:
Lower £35,500 – £58,950
Middle £58,951 - £82,400
Higher £82,401 - £105,850
The wording of the Guideline speaks of “*disabilities of up to 30% being at the lower end, 30%-50% in the middle, and in excess of 50% at the higher end.*”
29. The claimant’s Updated Schedule of Loss argued that for pain, suffering and loss of amenity “the claim is worth the top end of the lower end bracket...£55,000”. The skeleton argument then pitched it at £60,000, followed by oral submissions for £60,000-£65,000. The defence skeleton argument suggested a figure of up to £45,000.
30. The disability from asbestosis was assessed 9 months ago at around 25% with a likely slow progression to 30% over Mr Brown’s remaining lifetime. The appropriate level of damages is in my view £55,000, as initially proposed on behalf of the claimant by his lawyers at the end of September. Interest at 2% per annum from the date of service of the claim amounts to £699.16, making a total of £55,699.16.

Lost years

These are agreed at £1,930.13

My calculation of the value of this claim

31. (i) General Damages: £55,000 (interest: £699.16);
(ii) Past care, gardening, DIY and window cleaning: £10,956.70 (interest: £53.16);
(iii) Past travel: £187.50 (interest: £1.11);
(iv) Past utility charges: £305.50 (interest £1.92);
(v) Aids & equipment costs incurred: £602.15 (interest £3.36);
(v) Future care, gardening, DIY and window cleaning: £19,853.06;
(vi) Future equipment: £177.29;
(vii) Future travel: £333.50;
(viii) Future utility charges: £1,334.00;
(ix) Lost years: £1,930.13.

32. This amounts in total to £90,679.83, plus interest of £758.71 = **£91,438.54**.
33. After orally announcing the above figures as my assessment of damages it was pointed out to me that at the Case Management Conference on 28 June 2022 there was an order that the defendant pay interim damages to the claimant of £20,000 and £1,000 on account of costs within 14 days. I am told that this has not been complied with.
34. I have now also been informed that: (a) the defence have not made any offers to settle the claim, but that: (b) the claimant put forward a Part 36 offer of £72,500 in full and final settlement which the defendant had until 1 August 2022 to accept. My award has clearly substantially exceeded that sum and so the consequences of CPR Part 36.17(4) come into effect. It was not argued on behalf of the defence that it would be unjust for me to follow those consequences and I do not consider it to be unjust.
35. Under Part 36.17(4)(d) the claimant is entitled to an additional amount of **£9,143.85** representing 10% of the amount I have awarded including interest (see the White Book 36.17.4.5 and *Mohammed v Home Office* [2017] EWHC 3051 (QB)).
36. I also award interest under Part 36.17(4)(a) at the rate of 12% per annum (i.e. current base rate of 3%, plus 9%) as I indicated I would at the end of the hearing. Upon further examination of the notes to the White Book (36.17.4.1) it would appear to me that this interest should not be allowed on future losses and expenditure (see *Pankhurst v White* [2010] EWCA Civ 1445). A calculation of 12% p.a. on the sum of £67,051.85 (general damages and past losses excluding interest) for 102 days amounts to £2,248.53. In order to ensure that this does not conflict with Part 36.17(6) (also observing that it is a non-compensatory award of interest and bearing in mind I have selected a rate of 9% rather than 10% above base rate) I shall round it down to **£2,200**.
37. Pursuant to Part 36.17(4)(b) I direct that the defendant shall pay the claimant's costs on an indemnity basis from 1 August 2022, and pursuant to Part 36.17(4)(c) interest will run on those costs at the rate of 12% per annum. The costs order in respect of the claimant's costs prior to 1 August 2022 will be payable by the defendant on the standard basis.