



Neutral Citation Number: [2011] EWHC 1016 (QB)

Case No: TLQ/11/0448

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2011

Before :

THE HON. MRS JUSTICE NICOLA DAVIES DBE

Between :

MOHAMMED NAJIB

Claimant

- and -

JOHN LAING PLC

Defendant

Mr Harry Steinberg (instructed by Field Fisher Waterhouse LLP) for the Claimant
Ms Rehana Azib (instructed by Plexus Law) for the Defendant

Hearing dates: 7 and 8 April 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MRS JUSTICE NICOLA DAVIES DBE

Mrs Justice Nicola Davies :

1. The claimant seeks damages for personal injury, loss and damage arising from the negligent exposure to asbestos during the course of his employment as a joiner with the defendant between 1974 and 1980. As a result, the claimant has contracted malignant mesothelioma. Judgment has been entered for the claimant, damages now fall to be assessed.
2. The claimant was born on 8 June 1939, he is now 71. The onset of his symptoms occurred in September 2009 when he began to experience shortness of breath, a dry cough, intermittent fever and left sided chest pain. In October 2009 he was twice admitted to hospital on an emergency basis, he had recurrent pleural effusions and required repeat chest drainage. In December 2009 he was admitted to hospital for thoracoscopy, surgical biopsy, prolonged pleural drainage and an attempted talc pleurodesis. The diagnosis was established. In 2010 the claimant underwent radiotherapy. He was initially reluctant to undergo chemotherapy because of the potential side effects but eventually did so in May 2010. He experienced severe nausea and persistent vomiting, he was prescribed anti-emetic medication, his consultant oncologist described it as “a terrible time”. In June 2010, as he was not tolerating chemotherapy it was discontinued. The claimant was experiencing severe pain in December 2010, an increased dose of morphine was prescribed. By April 2011, the disease has metastasised to the claimant’s liver and bones. Palliative radiotherapy is to be offered for the bone metastases plus bisphosphates to attempt to control his “significant pain”. The claimant was too unwell to attend the hearing which took place on 7 and 8 April 2011.
3. The expert evidence in the form of reports and letters of Dr Rudd, a consultant respiratory physician, and Charlotte Wells, a registered general nurse, was not challenged by the defendant. The claimant relied upon two witness statements dated 1 July 2010 and 10 February 2011. The claimant’s son, Saqib Najib, produced a witness statement dated 17 February 2011 and gave evidence.
4. Agreement has been reached upon the following heads of damage:
 - i) Past care and assistance - £6,016.29
 - ii) Future care and assistance - £14,816.40
 - iii) Past sundry expenses - £2,000.00
 - iv) Future sundry expenses - £750.00
5. Deductions will be required to be made to the overall sum of damages awarded to take account of an interim payment of £50,000 plus any interest and £1,071 representing CRU recoverable social security benefits.
6. Four areas of disagreement between the parties require resolution, namely:
 - i) General Damages;
 - ii) Aids and Equipment;

- iii) The recoverability and cost of alternative treatment and medication;
- iv) The measure of future losses following the claimant's death.

General Damages

7. It is agreed that the claimant's diagnosis falls within the Judicial Studies Board (10th Edition) Category 5 (c) Asbestos – Related Disease in category (a) which states:

“Mesothelioma causing severe pain and impairment of both function and quality of life. This may be of the pleura (the lung lining) or of the peritoneum (the lining of the abdominal cavity); the latter being typically more painful. The duration of pain and suffering account for variations within this bracket”.

The bracket is £35,000 to £83,750, on present figures £36,000 to £86,440.

8. On behalf of the claimant, the sum of £80,000 plus interest is sought. The decisions of Hamblen J in *Beesley v New Century Group Limited* [2008] EWHC 3033 (QB), Satinder Hunjan QC, sitting as a Deputy High Court Judge, in *Watson v Cakebread Robey Limited* [2009] EWHC 1695 (QB) and Mackay J in *Fleet v Fleet* [2009] EWHC 3166 (QB) were before the court and of benefit to it.
9. The defendant accepts that the award of damages will be towards the top end of the JSB range. It is submitted that the deterioration in the claimant's symptoms and disability has been recent, previously the claimant retained a significant degree of amenity in terms of mobility and personal care. Allowing for a two year period of symptomatology, there has not been severe pain, impairment of function and quality of life throughout the entirety of this period. A figure of £75,000 with interest is proposed.
10. Dr Rudd has assessed the life expectancy of the claimant as being in the order of two years from November 2009. The onset of symptoms occurred in September 2009, by October 2009 the claimant was twice admitted to hospital, he has undergone radiotherapy and chemotherapy. His pain has been such that by December 2009, he was receiving morphine, this was increased in 2010, the level of pain now experienced can be uncontrolled. It was recently thought that the claimant had fractured his hip, such was the severity of the pain, no fracture was found. In recent times, the claimant's condition has deteriorated, he is now unable to visit the mosque because of his pain and lack of mobility. His cough, which has been a persistent feature of this disease, is particularly debilitating both at day and night. Such is the nature of this disease that pain will become intractable notwithstanding the use of morphine. As the tumour progresses to constrict the lung, this will increase the breathlessness of the claimant. The remaining months of the claimant's life will be painful, difficult and distressing.
11. The claimant's awareness that his life expectancy has been reduced is a relevant factor in the assessment of damages; s.1 (b) of the Administration of Justice Act 1982. In assessing damages I take account of the fact that the claimant has undergone surgery, repeated pleural drainage, radiotherapy and chemotherapy with particularly bad side effects. I note that by the date of his death the claimant will have been taking

morphine for about a year. The level of damages for mesothelioma reflect the exceedingly painful nature of the disease. I accept that the level of suffering of this claimant has been considerable and his clinicians are striving, even now, to control his pain. Upon the basis of Dr Rudd's postulated life expectancy, I assess damages in the sum of £80,000.

12. An uplift of general damages in the order of £5,000 is sought on behalf of the claimant to reflect the loss of his skills as a carpenter, adept at DIY tasks and his maintenance and upkeep of his house and garden. Reliance is placed upon the authority of *Phipps v Brooks* [1996] PIQR Q100 in which Stewart-Smith LJ held that this loss of amenity can be taken into account in assessing general damages. It was clear from the evidence of his son and the report of Charlotte Wells that since his retirement, the claimant has done little by way of DIY, and general maintenance. There is no sound evidential basis to substantiate a claim for this alleged loss of amenity.

Aids and Equipment

13. £6,544.13 is claimed, the equipment was proposed and priced by Charlotte Wells. It is said that the claimant intends to buy this equipment when it becomes necessary. He has already purchased a wheelchair at a cost of £210. At trial, a claim for a motor scooter was abandoned as being no longer feasible because of the lack of mobility of the claimant. The defendant offers a figure of £3,300 for this aspect of the claim. In issue are two items: a chair lift, £1,500 and a Motor Rise and Reclining Chair, £1,468.
14. The recent deterioration in the condition of the claimant raises the question as to how long he will be able to remain in a bed in the upstairs bedroom of his home. In his evidence, his son said that it was contemplated that at some point, his father would sleep in a room downstairs which would be converted into a bedroom. There is a cloakroom but no bathroom downstairs. It is a sad fact of this case that a chair lift will be of use for a limited period. Although limited, it is said it will enhance the quality of the life of the claimant.
15. The remaining months of the claimant's life will be painful and distressing. In so far as it is reasonable, everything that can be done, should be done to alleviate the suffering of this man. In my view, he is entitled to remain in his bedroom with access to a proper bathroom for as long as is reasonably practicable. To this end, I allow the cost of the chair lift. The claimant is at the centre of his family, he much enjoys their company, in particular, that of his grandchildren. The provision of a reclining chair will assist at the time of family visits. I allow the cost of the chair. The sum I allow for aids and equipment is £5,544.13.

Alternative Treatment and Medication

16. A claim for £15,286 is made. This relates to alternative treatments proposed by Dr Julian Kenyon of the Dove Clinic, London. The claimant did not wish to undergo chemotherapy because of its side effects. His son, Saqib Najib, researched alternative treatment on the internet. As a result, the claimant and his son had a consultation with Dr Kenyon who proposed the treatment of photodynamic therapy and drops. Dr Kenyon explained that drops would attach themselves to the cancerous cells, a high dose of light would be shone onto the body, this would burst the cancerous cells

- thereby reducing the tumour. The result of the reduction in the tumour would lead to a lengthening of the life expectancy of the claimant. Dr Kenyon told the claimant and his son that the treatment had proved successful in other countries and had prolonged patients' lives from the average of two years to seven years. It was explained that the side effects would be horrible pain which could be controlled by painkillers and there would be a swelling of the chest cavity.
17. It was the evidence of Saqib Najib that having been given this information by Dr Kenyon, he and his father raised the issue of this treatment with the claimant's general practitioner and Dr Steel, his treating oncologist. Dr Steel told the claimant and his son that there was no good research to support this treatment and it was not available on the NHS. The general practitioner also told the claimant's son that this treatment was not available on the NHS. Significantly, neither doctor sought to dissuade the claimant from undergoing this treatment. Dr Rudd in his report dated 13 July 2010 stated that there was no evidence to demonstrate that the treatment had any clinical value, it was well outside mainstream medicine. In a letter he said "I cannot suggest that there is any valid medical or scientific basis for the treatment which they have purchased." In his evidence to the court, Saqib Najib said that in undergoing the treatment the hope was that it would reduce the size of the tumour and thereby increase the life expectancy of his father.
 18. On behalf of the claimant, it is accepted that the treatment proposed by Dr Kenyon and provided by the Dove Clinic achieved nothing in terms of reduction of the tumour or the lengthening of life expectancy. No claim is made for its efficacy. In his evidence, Saqib Najib said that for a period it eased his father's cough. The sole issue is whether it was reasonable for the claimant to seek and thereafter undergo this treatment. Saqib Najib said that he found the profile of Dr Kenyon on the internet, he held appropriate medical qualifications. When the claimant and his son visited the Dove Clinic, it seemed to them to be an appropriate centre with appropriately dressed nurses. Mr Saqib Najib was surprised to find that having agreed to accept the treatment, he and his father were only then informed that the treatment was to be provided at a centre near Southampton. The treatment took six days over a two week period. The claimant was driven by his son for the treatment.
 19. In his evidence to the court, Saqib Najib vividly described the response of his father to proposed chemotherapy. He was frightened by the side effects, he did not want chemotherapy. His son, an intelligent man, researched alternative treatments. Faced with the knowledge of his father's short life expectancy and a deeply painful disease, I find that the actions of Saqib Najib were reasonable. Neither the claimant nor his son possess medical qualifications. What Dr Kenyon purported to offer was the potential to extend the life of the claimant coupled with less harsh treatment, albeit at a considerable financial cost: £9,950.00 for the photodynamic treatment, £747.62 for medication from the Dove Clinic. Medication, approved by Dr Kenyon, was obtained from America to attempt to boost the claimant's immune system at a cost of £4,409.79. Further medication recommended by Dr Kenyon was obtained at a cost of £178.72.
 20. Dr Kenyon presented with appropriate medical qualifications. When the claimant's oncologist and general practitioner learnt of the proposed treatment, whatever their own reservations, they did not say "Do not undertake this treatment". The claimant, faced with a harsh, painful illness and a short life expectancy, was offered the chance

of a longer life. He took it. I am unable to find that in these particular circumstances, the actions of the claimant were unreasonable. The actual cost of the treatment is high, but in the context of an extended life expectancy, it is not. I allow this claim but make clear that in so doing, nothing I have found should be construed as an endorsement of the treatment provided at the Dove Clinic.

Future Losses - the “lost years”

21. The claimant claims damages for future losses resulting from his reduced life expectancy based upon a multiplicand of £7,356.60. The defendant contends for a multiplicand of £2,043.50. In issue between the parties is the deduction to be made for living expenses. The claimant originally pleaded a discount of 50%, it was subsequently revised to 10%. The defendant contends for a reduction of 75%.
22. The claimant’s annual net income is £8,174. It is agreed that the sum to be deducted as living expenses is the proportion of the claimant’s net income that he spends to maintain himself. Any sums expended to maintain or benefit others do not form part of his living expenses and are not deductible. It follows that any monies used by the claimant for his relatives or charitable causes are not part of his own living expenses and so should not be deducted. Further, shared expenditure must be apportioned and deducted in accordance with these principles. In a case such as this, namely where the claimant and his wife live in the home, their adult son lives with them but is not financially dependent on his father, the courts have adopted a convention of a 50% deduction, *Phipps* (above). The conventional discount can be displaced by evidence, *Shanks v Swan Hunter Group Plc* [2007] EWHC 1807 (QB).
23. On behalf of the claimant it is said his actual living expenses are very limited, his son, Saqib Najib, lives with him and meets almost all of his living costs. It was the evidence of Saqib Najib that since 2005, he has paid the household bills, bought the weekly grocery shopping and paid for clothes and other items which his parents require. Mr Najib owns a successful children’s nursery, he produced personal and business banks statements. The Lloyds TSB personal statements commence in December 2008, the NatWest business account statements commence on 2 January 2009. The Lloyds TSB statements show payment of gas, electricity and water utility bills. Both sets of statements show supermarket shopping. Mr Najib told the court that supermarket bills in excess of £200 or £250 would be for his business, below that figure would be for home.
24. The evidence of Mr Najib appears to be contradicted by entries in the report of Charlotte Wells:

“Despite his medical conditions, Mr Najib had been very busy and active prior to the onset of his asbestos-related illness. He used to walk half-a-mile to the mosque two or three times every day. He used to enjoy going out and seeing friends and family and he also used to do the shopping. He does not drive, nor does Mrs Najib, and so he has always tended to depend on his son for any transport needs.....Mrs Najib always tended to see to the domestic chores, but she and her husband used to do the shopping together. Traditionally, Mr Najib did all the DIY

and decorating around his home, but has done nothing over the last few years.”

25. The claimant was unable to give evidence, he could not be questioned as to the account which Charlotte Wells records in her report. When cross-examined, Mr Saqib Najib accepted that he was present when his father was visited by Charlotte Wells and had taken part in the discussions with her. He had read Charlotte Wells report, he thought it a fair and accurate reflection of what had been discussed.
26. Mr Saqib Najib used his business account to pay for what he said were household bills, of itself this evidence is less than satisfactory. It may well be that Mr Najib, as the only driver living at his parent’s home, would do the supermarket shopping. This would not be inconsistent with his father and/or mother doing daily shopping in and around the locality. It would also be consistent with the picture painted of his father enjoying activity outside his home.
27. A further difficulty faced by the court and relied upon by the defendant is that the bank statements provided by the claimant relate only to the period January 2010 to February 2011. It is clear from those statements that the claimant still pays for a television licence and household insurance. Other payments to the London Borough of Newham were attributed to financial responsibilities of family members. A summary of cheques paid by the claimant between December 2008 and February 2011 had been prepared. These sums included utility bills, payments to builders’ merchants, payments to surveyors for planning permission and a number of charitable donations. It was the case on behalf of the claimant that the utility bills, builders’ merchants and planning permission all related to property owned by family members. Nothing better demonstrates the sense behind the pragmatic thinking of the courts in identifying a conventional discount than the bank statements provided to this court and the attempts to explain the many and various items.
28. I am satisfied that in living with his parents, Mr Saqib Najib has taken over some of the household expenses. His is a close family, he provides support, in the broadest sense of the word, for his parents. I am not satisfied that there is reliable evidence before the court for the period 2005 to 2011 which demonstrates that Mr Saqib Najib has taken over all the household expenditure relating to his parents, in particular his father.
29. It is clear from the evidence before the court that prior to his illness, the life enjoyed by the claimant centred upon his family and his daily visits to the mosque. I accept that his was a modest lifestyle, allowing for some socialising. There is nothing in the evidence that I have read or heard which suggests that the claimant’s living expenses were as high as 75%. Given the unsatisfactory nature of the evidence before the court, in particular the absence of relevant bank statements and clear evidence as to precisely what was spent by whom on household expenses, I am satisfied that the appropriate discount in this case is the conventional discount, namely 50%. Accordingly, the multiplicand is £4,087.
30. A multiplier of 12.35 is agreed. The sum for “lost years” is £50,474.45.
31. My calculation of the value of this claim is as follows:

- i) General Damages: £80,000 (Interest: £392)
- ii) Past Sundry Expenses: £2,000 (Interest: £15.98)
- iii) Alternative Treatment: £15,286 (Interest: £89.20)
- iv) Past Care: £6,016.29 (Interest: £22.75)
- v) Future Care: £14,816.40
- vi) Aids and Equip: £5,544.13
- vii) Future Sundry Expenses: £750
- viii) Future Loss of Earnings (Lost Years): £50,474.45
- ix) Total (gross): £175,407.20
- x) Sums to be Deducted:
 - Interim Payment: £50,000
 - Interest: £25
 - CRU: £1071
- xi) Total Deductions: £51,096

32. Judgment for the claimant is awarded in the sum of £124,311.20.