



Neutral Citation Number: [2020] EWHC 2910 (QB)

Case No: QB-2019-004537

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 30th October 2020

Before:

DAN SQUIRES QC
(Sitting as a Deputy High Court Judge)

Between:

KENNETH HAMILTON

Claimant

- and -

NG BAILEY LIMITED

Defendant

Ivan Bowley (instructed by **The Asbestos Law Partnership**) for the **Claimant**
Richard Seabrook (instructed by **Weightmans LLP**) for the **Defendant**

Hearing date: 8 October 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 5pm on 30th October 2020.

Dan Squires QC:

Introduction

1. This is an assessment of damages in an asbestosis claim, liability having been conceded by the Defendant.
2. The Claimant seeks an award of “provisional damages” pursuant to the Senior Courts Act 1981 s 32A and rule 41.2 of the Civil Procedure Rules. That will enable him to receive damages now for the injuries from which he is currently suffering, and to return to court if particular conditions, linked to his asbestos exposure, were to develop in the future. It is not disputed that the Claimant is, in principle, entitled to a provisional damages order. Nor is there a dispute as to the conditions that should be the subject of the order and for which the Claimant will be permitted to return to court if they were to materialise. The dispute before me was as to the quantum of the general damages to which the Claimant is entitled for pain, suffering and loss of amenity, and, to a lesser extent, the quantum of special damages. It is the Claimant’s case that he should receive approximately £36,500 in general and special damages. The Defendant contends he should receive around £25,000.

Factual background and factual findings

3. The Claimant was born on 24 September 1946. He is now aged 74.
4. Between 1968 and 1981 the Claimant was employed by the Defendant and worked as an electrician. During that time he was exposed to asbestos.
5. The Claimant retired from work in 2009 at the age of 63. In February 2012 he was assessed in a respiratory clinic as he was getting chesty coughs. He had a chest x-ray which showed calcified pleural plaques. In 2018 the Claimant began to experience difficulties breathing and was referred to a chest clinic. He was given a CT scan in December 2018. Asbestosis was diagnosed.
6. On 13 June 2019 the Claimant was examined by Dr Barber, a consultant respiratory physician, who produced a report submitted in these proceedings dated 3 July 2019. Dr Barber’s expert evidence has not been disputed.
7. Dr Barber concluded that the Claimant, who was aged 72 when he was assessed in June 2019, had a life expectancy of around 14 and a half years. That would be a little over 13 more years from today’s date. Dr Barber noted that the Claimant had “multiple bilateral pleural plaques together with mild subpleural basal fibrosis with a predominantly reticular pattern, together with subpleural lines” He described those appearances as “entirely consistent with mild asbestosis” and concluded that the Claimant “does have significant disease in clinical terms”.
8. On 17 December 2019 the Claimant brought proceedings against the Defendant. He claimed that the Defendant exposed him to asbestos, and in so doing breached a number of statutory duties, and was negligent.

9. Liability was not admitted in the Defence submitted on 11 February 2020, but judgment on liability was entered on 1 May 2020. The Defendant made an interim payment of damages of £20,000. It is accepted before me by the Defendant that the Claimant suffers from “mild asbestosis”, albeit a significant disease in clinical terms, and that the Defendant is liable for the injuries the Claimant has suffered.
10. As to the Claimant’s symptoms, the Claimant submitted three witness statements. That evidence was not challenged by the Defendant. The Claimant said in his first witness statement, dated 24 April 2019, that he noticed being “breathless” when gardening. He described himself as someone who has “always been a very keen gardener” and that “after about 30 minutes or so gardening I find that I am getting short of breath and have a tightness of my chest.” In a subsequent statement of 16 July 2019 he stated that he becomes breathless when “strenuously exercising” and repeated his evidence that after half an hour of gardening he became “short of breath” and experienced “tightness in my chest.” He continued: “it seems to make me more tired”. In the Claimant’s application for Industrial Injuries Disablement Benefits, of February 2019, the Claimant stated that his breathing “got worse ... about six months ago,” and it was that which led to his referral to the chest clinic and the subsequent CT scan. It appears, therefore, that the Claimant’s asbestosis symptoms probably began in the second half of 2018. I accept his evidence as to how he experiences those conditions which appear to have been relatively stable since early 2019.
11. Dr Barber deals with the Claimant’s symptoms, and the effect on him of the asbestosis, in his report. He noted:

“[The Claimant] did not describe disabling breathlessness, but his exercise tolerance is probably not quite normal. He played badminton until thirteen years ago, after which he played mainly golf but now confines physical activity to tending his garden, of which he can manage up to an hour, having managed several hours only a few years ago. He lives in a bungalow but can climb a flight of stairs without distress.”

Dr Barber concluded:

“There is ... an indication of a slight reduction in exercise capability in recent years but nothing which can be specifically benchmarked. Taking account of all the available evidence, I would assess [the Claimant] as around 10% disabled from asbestosis, sufficient to cause breathlessness on prolonged or strenuous exertion, as indeed he does experience and which has been a cause of progressive reduction in his activities of daily living and recreation, though he remains well and active in general terms.”

12. As to future prognosis Dr Barber stated as follows:

“The natural history of asbestosis is to progress slowly, and I think it likely that [the Claimant] will acquire an additional 5% respiratory disability in the course of his lifetime. That figure could rise to 10% and I would also assess an approximate 5%

risk of more severe and rapidly progressive asbestosis sufficient to cause respiratory failure with life-limited effects... [The Claimant's] asbestos exposure history with mild asbestosis confers an approximately 3% probability of the future development of malignant pleural mesothelioma. This would almost certainly prove progressive and life-limiting were it to develop. I would also assess an approximate 3% risk of lung cancer, two-thirds asbestos related."

13. One issue in dispute before me was what current level of respiratory disability, attributable to asbestos, I should assess the Claimant to be suffering from. As noted above, Dr Barber refers to a figure of "around 10%". Mr Seabrook for the Defendant pointed to a decision of the Department of Work and Pension of 1 March 2019 in relation to the Claimant's claim for Industrial Injuries Disablement Benefits. It found the Claimant to be "6% disabled from 15 April 2018". In the light of that, and the fact that Dr Barber had referred to the Claimant's level of respiratory disability as "around 10%", Mr Seabrook invited me to conclude that the Claimant's level of disability should be described as being "up to 10%."
14. Mr Bowley, for the Claimant, pointed to Dr Barber's summary of his findings where he had referred to the Claimant being assessed "at 10% disability from mild asbestosis" without suggesting that the figure was "around 10%". He also pointed out that the Defendant had the opportunity to put questions to Dr Barber and had chosen not to do so. He urged me to treat the correct figure of the Claimant's level of disability as currently being "10%", rather than anything lower.
15. While I can see some force in Mr Seabrook's submission, it is not one I consider I can accept. A finding of "10% disability" is inevitably an approximation and I consider that was what was meant by Dr Barber referring to it as "around 10%" in the body of his report, and as Mr Bowley pointed out, in his summary, Dr Barber simply referred to "10% disability" without qualification. As Mr Bowley also pointed out, pursuant to Directions ordered on 14 May 2020 the Defendant was given the opportunity to put questions to Dr Barber. The Defendant could have asked Dr Barber whether there was some difference between his referring to "around 10%" and "10%", and for his comment on the DWP figure. The Defendant chose not to avail itself of that opportunity. In those circumstances I do not consider it appropriate to attribute significant weight to the DWP's 6% figure where no evidence has been provided in these proceedings by the doctor who produced it, and where the only expert report before me is the undisputed report of Dr Barber which gives a different figure. I also see no basis for concluding that the level of disability was "up to 10%." Dr Barber's evidence was of a disability of "around 10%" or "10%". I take that to mean it could be a little more or a little less than 10%, but that the best approximation is that the Claimant is currently experiencing a 10% respiratory disability caused by asbestosis. That is the figure I will apply.
16. As to the symptoms the Claimant suffers from, there was initially some dispute before me as to whether a "persistent morning cough" identified by the Claimant was to be attributed to his asbestosis. It was, however, accepted during the hearing on behalf of the Claimant that I should treat it as neutral, as it is not clear what caused the cough. The other symptoms relied on by the Claimant were some breathlessness on exertion, chest tightness and fatigue/tiredness. The Defendant did not seek to cross-examine the

Claimant and I have no reason to doubt the symptoms he set out in his witness statement and which he described to Dr Barber. Those symptoms are that after about 30 minutes of gardening the Claimant suffers from breathlessness, chest tightness and tiredness, and he can now only garden for up to an hour having managed several hours a few years ago. I also accept Dr Barber's evidence that the Claimant appears fit and is generally active, but that while he does not have "disabling breathlessness" his "exercise tolerance is ... not quite normal." As set out above, the evidence suggests that while the Claimant had pleural plaques in 2012, he did not suffer from the symptoms of what was later diagnosed to be asbestosis until 2018.

17. I also accept Dr Barber's unchallenged evidence as to the Claimant's future prognosis, namely that it is likely that he will acquire an additional 5% respiratory disability in the course of his lifetime (though the figure could rise to 10%); and that he has a 5% risk of more severe and rapidly progressive asbestosis, a 3% risk of mesothelioma and a 3% risk of lung cancer (two thirds of which is asbestos related). The significance of those findings are considered further below.

General damages

18. The primary dispute before me was the general damages I should award, on a provisional basis, for pain, suffering and loss of amenity ("PSLA"). Before turning to the analysis of the Claimant's case, there are a number of issues of principle as to the applicable legal framework which it is helpful to set out.

Legal framework

19. The first issue of principle, and on which the parties agree, is that I should use the 15th edition of the Judicial College Guidelines on Personal Injury ("the JC Guidelines") to structure my analysis. Both parties urge me to identify the applicable bracket for the claim, and then to determine where within the bracket it falls.
20. The parties agree on the two potentially relevant brackets but disagree on which one applies to the Claimant. The brackets are:

“£36,060-£99,330 Asbestosis and pleural thickening—where the level of disability attributable to asbestos will be in excess of 10% causing progressive symptoms of breathlessness by reducing lung function. Awards at the lower end of the bracket will be applicable where the condition is relatively static. Higher awards will be applicable where the condition has progressed or is likely to progress to cause more severe breathlessness. Awards at the top end of the bracket will be applicable where mobility and quality of life has or is likely to become significantly impaired and/or life expectancy significantly reduced. This is a wide bracket and the extent of respiratory disability will be highly significant with disabilities of 10–30% being at the lower end, 30–50% in the middle, and in excess of 50% at the higher end.

£14,140-£36,060 Asbestosis and pleural thickening—where the level of respiratory disability/lung function impairment

attributable to asbestos is 1–10%. The level of award will be influenced by whether it is to be final or on a provisional basis and also the extent of anxiety.”

21. I will describe those brackets as the “higher” and “lower asbestosis brackets”. The Claimant contends that he should be placed within the higher bracket for asbestosis (£36,060-£99,330). The Defendant contends for the lower bracket (£14,140-£36,060). I set out my conclusion on that dispute below.
22. The second issue of principle is how to approach an award for provisional damages, as opposed to an award for full and final general damages. Both parties agree that an award for the former is inevitably lower than the latter. That is because a full and final award will include within it damages for the possibility of an individual suffering from more serious conditions in the future. Where an award is made for provisional damages, the claimant retains the possibility of returning to court if those more serious conditions materialise. In this case an award of provisional damages will leave open to the Claimant the possibility of returning to court and seeking further damages if he develops asbestos-related diseases of mesothelioma, lung cancer or severe progressive asbestosis. A provisional damages award at this stage, and which allows for the possibility of a return to court, will therefore be lower than a full and final award which would have included within it a proportion of damages in recognition of the possibility of the more serious conditions developing.
23. As I indicated, the principle that an award for provisional damages will be lower than the equivalent award for full and final damages is not disputed. As to how I should approach the calculation of damages, the Defendant contends that I should reach a nominal figure for damages calculated on a full and final basis, and then reduce that by the expected future damages for the more serious conditions. Thus, for example, Dr Barber has estimated that the Claimant has a 3% chance of developing mesothelioma. Pursuant to the JC Guidelines, the median award for PSLA for mesothelioma is around £95,000. Thus a full and final award for someone in the Claimant’s position would include the expected damages for developing mesothelioma of 3% of £95,000, namely £2850. If, as the Defendant suggests, I begin by reaching a nominal figure for PSLA on a full and final basis, I would then reduce the figure by £2850 to assess the equivalent provisional damages award. I should then make similar reductions for the other return conditions.
24. There is some support in the authorities for the Defendant’s approach. In *Rothwell v Chemical & Insulating Co* [2006] EWCA Civ 26, [2006] ICR 1548, Smith LJ (with whom the other judges agreed on this point) held that when calculating full and final damages in such cases, the correct approach was to include damages, calculated in an arithmetic way, for the possibility of a serious condition developing in the future (see paragraphs 104 and 170-180). Thus if a claimant faced a 1% risk of mesothelioma, which then attracted an award of £60,000, Smith LJ suggested they should be entitled to 1% of £60,000, i.e. £600, as part of their damages award to compensate for that risk. That would reflect the probability of the risk of mesothelioma materialising and the likely damages the individual would receive if it did (see paragraphs 174 and 179). *Rothwell* went to the House of Lords but Smith LJ’s analysis on this point was not questioned.

25. Mr Bowley pointed out that *Rothwell* was concerned with increasing the provisional award that would otherwise be received in order to compensate for the risks of more serious conditions in an award made on a full and final basis. That did not mean, he submitted, that it was appropriate to start from a nominal full and final award and then reduce the award in some arithmetic way so as to reach a figure for a provisional award. A number of cases considering damages for asbestosis and related conditions were put before me (see below at paragraphs 37-38). Mr Bowley pointed out that while one of the cases (*Person v BT Plc* (Birmingham Country Court 2008)) adopted the Defendant's arithmetic approach, others did not.
26. I accept that it may not always be appropriate for a Court to start with a nominal award for full and final damages and then look to reduce it for a provisional award. There may, for example, be cases where it is sensible to conduct the exercise the other way around, and start with a nominal provisional award and increase it to reach a full and final award. It seems to me, however, that the arithmetic approach advocated by the Defendant is a sensible one. Provided it is clear how a nominal figure is reached, and what such an award contains, it seems sensible to start with that figure and then reduce or increase the award as appropriate. It makes the process of reaching a figure clearer and more transparent and facilitates easier comparison across different cases. Simply arriving at a provisional figure, without explaining how the provisional nature of the award was assessed, makes that more difficult.
27. A third issue of principle concerns how I should approach the brackets in the JC Guidelines. As set out above, there are two potential brackets in the Guidelines I am considering. That raises a question as to whether I should treat the brackets for awards in asbestosis cases as reflecting full and final damages awards or provisional awards or some mixture of both. As the introduction to the Guidelines makes clear, their aim is to achieve consistency in awards of damages through a "distillation of awards of damages that have been or are being made in the courts". They are intended as "guidelines and not tramlines" with the ultimate assessment a "prerogative of the courts." While the Guidelines are not to be read as statutes, it is important in understanding the Guidelines to know what the figures they contain are intended to refer to. The top end of the lower asbestosis bracket, and the lowest end of the higher bracket, give a figure of damages of £36,060. Is that intended to be a figure for claimants receiving full and final damages whose injuries lie on the boundary between the brackets or those receiving a provisional award or some combination of the two?
28. Mr Bowley submitted that the brackets are intended to include both provisional and full and final damages awards. He submitted that the Guidelines are intended to reflect previously decided cases, and that, as many asbestosis cases include claims for provisional damages, it should be assumed that within any particular bracket there will be both provisional and full and final damages cases. There is support for that contention in the wording used for the lower asbestosis bracket where it is said that "The level of award will be influenced by whether it is to be final or on a provisional basis." That suggests that the bracket contains provisional and final damages awards and that the fact an award is made on a provisional basis places it lower within the bracket and the fact that it is made on a final basis places it higher.
29. Mr Bowley may well be right that the JC Guidelines include both full and final and provisional damages awards. If that is correct, however, it creates significant difficulties for the application of the Guidelines.

30. The top of the lower bracket should attract an award of around £36,000, and the same for the bottom of higher bracket. The problem is that an award of £36,000 on a provisional basis will be appropriate for a significantly different level of injury than an award for £36,000 made on a full and final basis. A person receiving an award of £36,000 on a provisional basis might expect to receive, say, £41-42,000 for the same injury if the award was made on a full and final basis. An award of £36,000 will therefore be appropriate for a significantly more serious injury if made on a provisional basis than will be an award of £36,000 if made on a final basis. According to the Guidelines an award of £36,000 is appropriate for someone with a disability of 10% and otherwise with characteristics placing them at the top end of the lower bracket. The difficulty is that it is not clear if that is to be accorded to those seeking provisional damages with that kind of injury, or those seeking full and final damages.
31. I asked the parties for assistance on this issue in writing after the hearing and received a helpful response from both counsel. It was suggested by Mr Seabrook that for the lower bracket (which provides for awards of between £14,140 and £36,060), it should be understood that the highest award of £36,060 will be for the most serious cases within the bracket determined on a full and final basis (with the equivalent if provisional damages being sought at, say, £31,000). Meanwhile the lowest award of £14,140 would be for the least serious cases on a provisional basis (with the same case attracting, say, £19,000 on a full and final basis). Similarly, in the next bracket up, the lowest awards of £36,060 should be regarded as being appropriate for the least serious injuries assessed on a provisional basis, with the equivalent full and final award of say, £41,000.
32. Mr Seabrook's approach provides some clarity as to whether one is dealing with full or provisional awards when considering the brackets. If it is correct, however, it also creates real difficulties for the application of the Guidelines.
33. It is apparent from the JC Guidelines that the higher and lower asbestosis brackets are intended to operate on a continuum with the lowest end of one bracket being the same as the highest end of the bracket below. Thus a person at the bottom end of the higher bracket should have symptoms only slightly worse, and an injury only slightly more serious, than a person at the top end of the bracket below. That is not surprising. There is no particular magic in the precise place where the boundaries between the different brackets are drawn, and no obvious difference in kind, as opposed to degree, between those just below and those just above the boundary line of the two asbestosis brackets. If the brackets operate as Mr Seabrook suggests, however, it creates an unjustified and unworkable discontinuity in my view. It means that the top of a particular bracket will inevitably be reserved for cases of full and final damages (with provisional awards for the same injury at a lower level), while the bottom of the next bracket up will inevitably be for provisional awards that fall within the bracket (with final awards for the same injury at a higher level). That leads to difficulties.
34. It means a person at the top end of the lower asbestosis bracket, seeking a full and final damages award, would receive around £36,000 and, say, £31,000 if the award was provisional. If, however, the person had very slightly more serious symptoms, so as to place them in the bracket above, they could not receive an award on a full and final basis very slightly higher than £36,000. A figure of just over £36,000 in the higher bracket would be reserved for cases of provisional damages. The lowest end of the higher bracket on a full and final basis would be around £41,000. But that would mean two people with almost identical conditions receiving markedly different awards

because one is just below, and the other just above, a bracket boundary. It is not clear that can be how the JC Guidelines are intended to operate, and certainly there is no suggestion that that kind of discontinuity is appropriate.

35. I was not pointed to anything in the Guidelines or any authority that would resolve these issues. Ultimately it may be something that would be helpful for those drafting the Guidelines to clarify. It does not matter whether the Guidelines, and the brackets for different levels of severity of injury, reflect awards that are regarded as appropriate on a provisional basis or on a final basis, but it does seem to me that it needs to be clear which. It strikes me as potentially problematic, especially when applied to cases near the borderline of different brackets, for the Guidelines to seek to reflect both types of awards at the same time in an undifferentiated way. I set out below how I propose to deal with this issue in the context of the present case.
36. Finally, before turning to the award of damages appropriate in the present case, it is helpful to consider awards made in similar cases. As set out above, both parties urged me in determining quantum to apply the JC Guidelines. They also, however, referred me to a number of asbestosis cases, with some degree of similarity to the present, which they suggested were helpful for determining quantum.
37. I was referred to two cases in which full and final PSLA awards were made in asbestosis and/or pleural thickening cases:
- i) **Hughes v Nodit Ltd (2003)**

H was a 67 year old man who received a full and final PSLA award of £23,000 for an asbestos related disease which caused a 10% respiratory disability (with another 10% respiratory disability caused by unrelated matters). There was a 10% risk of the disease progressing to a respiratory disability of between 20-30%. The PSLA award H received would now be worth around **£37,000**.
 - ii) **Fox v Manchester CC (2006)**

F was a 73 year old man who received a full and final PSLA award of £20,500 for an asbestos related disease which caused a 10% respiratory disability (with another 20% respiratory disability caused by unrelated matters). There was a 10% risk of the disease progressing to cause a material increase in disability. The PSLA award F received would now be worth around **£31,000**.
38. I was referred to four cases in which provisional PSLA awards were made in asbestosis and/or pleural thickening cases:
- i) **Billiard v Swan Hunter (2003)**

B was a 68 year old man who received a provisional PSLA award of £18,000 for an asbestos related disease which caused a 10% respiratory disability (with another 10% respiratory disability caused by unrelated matters). The prognosis was that the asbestosis would worsen over time, but would be unlikely to produce more than a mild/moderate disability. The PSLA award F received would now be worth around **£29,000**.

ii) **Pearson v BT (2008)**

P was a 65 year old man who received a provisional PSLA award of £20,900 for an asbestos related disease which caused a 5% respiratory disability but which would increase by 1% per year. The PSLA award P received would now be worth around **£28,000**.

iii) **Allen v Wright Brothers (2009)**

A was a 61 year old man who received a provisional PSLA award of £24,500 for an asbestos related disease which caused a 10% respiratory disability. There was a 10% risk of a further 10% deterioration in his condition. The PSLA award A received would now be worth around **£34,000**.

iv) **Prater v British Motor Holdings (2016)**

P was an 80 year old man who received a received a provisional PSLA award of £30,250 for an asbestos related disease which caused a 10% respiratory disability. He had suffered asbestosis symptoms for some six and a half years by the time of trial. The prognosis was that P's respiratory disability was likely to increase by a further 5% over the following decade. The PSLA award F received would now be worth around **£34,000**.

39. Both parties suggested caution was appropriate in relation to the older cases, referred to above, and it is not clear how much one can usefully take from cases that are nearly 20 years old. It is, however, notable that the range of awards across all the cases is relatively narrow, with the provisional awards being between £28,000-£34,000 and with the final awards, albeit in only two relatively old cases, being between £31,000-£37,000. The cases closest to the present would appear to be *Prater* and *Billiard*. In both cases the individuals suffered a 10% respiratory disability caused by asbestosis and/or pleural thickening with a likelihood of some further deterioration. The awards in the two cases were provisional, and, at present value, were £34,000 and £29,000 respectively.

Analysis in present case

40. The key dispute between the parties concerned the appropriate bracket of the JC Guidelines for the Claimant's injuries. There was also a dispute, once the correct bracket is identified, as to where within that bracket the Claimant's case should fall.
41. Mr Seabrook contended that the Claimant should fall within the lower asbestosis bracket. He notes that the bracket applies to those with a respiratory impairment of "1-10%" and that, even, if I take the figure for the Claimant as being 10% impairment, that bracket applies to him. Mr Seabrook further notes that the Claimant is relatively old, at 74, and has only had symptoms for 2-3 years. He notes that the asbestosis the Claimant is suffering from is described as "mild", and that the only impact on him relates to breathlessness while gardening. He notes that, since his diagnoses, the Claimant has not returned to his GP in relation to his condition, has no plans to attend his consultant who describes him as "well", and has not shown a deterioration in his symptoms since his first witness statement filed nearly one and a half years ago. Mr Seabrook contends that a full and final award in such a case would not be at the top end of the lower bracket,

and should not exceed £30,000. Reducing the award to take account of the provisional nature of the award, the Defendant submits that £24,000-25,000 is the appropriate figure.

42. Mr Bowley submits that the case properly falls within the higher asbestosis bracket. He recognises that higher bracket applies to cases with a level of disability “in excess of 10%”, but notes that the JC Guidelines also refers to such cases as “causing progressive symptoms” which, he submits, applies to the Claimant. Mr Bowley also notes that the Guidelines refer to the width of the bracket, and that the lower end of the bracket is said to cover those with “disabilities of 10-30%”, which shows, he submits, that it encompasses those, such as the Claimant, with a 10% disability. He notes that in the Claimant’s case, unlike in some of the other cases referred to above at paragraphs 37-38, the evidence suggests that deterioration to a disability of 15% is “likely”, rather than merely possible, and could rise to 20%. He also notes that the Claimant is a “very keen gardener” and that the asbestosis has had an impact on what appears to be his primary pastime. Mr Bowley submits that, taking account the Claimant’s life expectancy, age, symptoms and the level of his disability, as well as the progressive nature of his condition, a provisional award at the bottom end of the higher asbestosis bracket is appropriate, namely £36,060. He submitted that would be equivalent to a full and final award of around £41,000.
43. In my opinion, while the Claimant’s case sits close to the borderline of the two asbestosis categories in the JC Guidelines, it falls within the lower one. The JC Guidelines should not be read as a statute, but it does appear from the language used in the Guidelines that the lower bracket is intended for level of respiratory disability of 10% and below, while the higher bracket is intended for cases above 10%. The lower bracket is said to be applicable in cases of impairment of “1-10%”. That applies to the Claimant. The higher bracket applies to cases “in excess of 10%”. That does not, on its face, apply to him. I do not consider that the reference later in the paragraph describing the higher bracket, which refers to the bracket as “wide” and including “disabilities of 10-30% ...at the lower end”, is intended to mean anything different from the start of the paragraph which clearly refers to conditions “in excess of 10%” disability.
44. I also do not accept Mr Bowley’s submission that because the Claimant’s condition is likely to deteriorate, that places him in the higher bracket. The higher bracket applies to cases of disability “in excess of 10% causing progressive symptoms of breathlessness by reducing lung function.” It does not refer to cases of impairment “in excess of 10%” or cases with “progressive symptoms”. The key factor separating the brackets is the level of current impairment. The fact that the Claimant’s condition is likely to deteriorate by a further 5% is relevant to an assessment of quantum, but in my view it is a factor that goes to where he is placed within the lower bracket, rather than moving him from the lower to the higher bracket. One can imagine, for example, a person with an impairment of 8% who is diagnosed as likely to deteriorate by a further 5% over the course of their life. In my view such a person would fall within the lower bracket for the purpose of assessing damages as they currently have a disability below 10%, even if at some point in their life they are likely to suffer a disability in excess of 10%. The Claimant does not currently have a disability in excess of 10%, and notwithstanding the likelihood of deterioration, his case falls within the lower asbestosis bracket.
45. As to where the Claimant would come within the lower bracket:

- i) Mr Seabrook is correct that, generally, the younger the age at which a person begins to suffer from asbestosis, the higher will be the appropriate award of damages. From the cases referred to me, most of those bringing claims were in their 60s or 70s at the date of trial (or in the case of Mr Prater aged 80). That is not surprising given the nature of the disease. The Claimant first experienced asbestosis symptoms aged 71-72, which would place him roughly in the middle of the cases to which I was referred.
 - ii) I also note that the JC Guidelines referred to the level of award being influenced by the level of an individual's "anxiety", and that, as Mr Seabrook pointed out, there is no evidence of any particular anxiety experienced by the Claimant. As Mr Bowley pointed out, however, there was no suggestion in any of the cases to which I was referred that the claimants were suffering from any particular anxiety or that the lack of evidence of anxiety was regarded as significant.
 - iii) I also note that the only time the symptoms are experienced in the Claimant's case is when gardening, but as Mr Bowley noted that appears to be his primary hobby and the one in which he experiences exertion. If he suffered from breathlessness on other occasions, such as walking upstairs, it is unlikely he would be assessed as 10% disabled and therefore would not be in the lower bracket at all.
46. Taking all of the above into account, I would place the Claimant close to the top end of the lower bracket. He is not the youngest age at which individuals can begin to exhibit asbestosis symptoms, and I note that there is no evidence of anxiety and relatively little impact on his daily life. On the other hand he does experience breathlessness in what appears to be his primary pastime. Of greater significance is the fact that his current disability is assessed as 10%, which is intended to be the top of the lower bracket, and that he is likely to suffer a further 5% deterioration. The latter clearly makes his injury more serious than those whose condition is unlikely to deteriorate significantly. I would therefore place the Claimant a little below the very top of the lower bracket giving a figure of £35,000.
47. If a figure of £35,000 is appropriate for a person towards the top end of the lower bracket, is that intended for those seeking full and final awards or provisional awards? As set out above, that is not clear. Mr Seabrook submitted that the top of the lower bracket is only appropriate for full and final awards falling within that bracket. Mr Bowley was more equivocal. If I assume that the top of the bracket would be appropriate if I was making a full and final award, both parties accepted that equivalent provisional award would need to be lower.
48. As I indicated, the Defendant suggested an arithmetical approach to calculate the deduction that should be made to take account of the provisional nature of the damages award. That includes, as set out above at paragraph 23, a reduction of £2850 to reflect a 3% risk of mesothelioma. It also includes a further reduction of £1,500 to take account of the 2% chance assessed by Dr Barber of the Claimant developing asbestosis related lung cancer (with £70,000 as the approximate median figure for PSLA for lung cancer and with 2% of that figure being £1500). Mr Seabrook also suggested a reduction of £3,500 calculated on the basis of a 5% chance of the Claimant developing severe asbestosis which would attract an award of £70,000. As Mr Bowley pointed out, the Claimant would not, in fact, be awarded £70,000 if he developed more severe asbestosis

as the figure would be reduced by the award of damages for the less severe asbestosis which I am now making. Mr Seabrook accepted that, and said that was factored into his calculation because rather than simply adding up the figures of £2850, £1500 and £3500 (which would give a figure of £7850) he was proposing a reduction from a nominal full and final settlement of £5-6000. That would also take account of some overlap between the different conditions. Mr Bowley did not demur, and submitted that, if an arithmetic approach, was taken the difference between provisional and final award in this case would be around £5,000. I consider that to be an appropriate approximate figure.

49. That means if the Claimant would in principle receive £35,000 for a full and final award, the appropriate award on a provisional basis is £30,000. I am conscious, however, as set out above, that it is not entirely clear whether the JC Guidelines' brackets are intended to give figures for full and final awards, provisional awards or some mixture of both. I am also conscious that an award of £30,000 would be somewhat low when compared to analogous cases. As set out above at paragraph 39, in the four cases to which I was referred in which provisional awards were made, the range of awards was between £28-34,000. When compared to those other cases, in my view the Claimant's case is closer to the more serious ones. Although he was a little older than some of the other claimants in the cases referred to me, he not only had a current disability of 10% but an assessment of likely further deterioration which differentiates his case from at least some of the others.
50. I have borne in mind the figures from the other cases. I also bear in mind that the JC Guidelines are intended to be guidelines not tramlines, and that they are intended to assist with, rather than dictate, an assessment, and that it is not entirely clear whether the Guideline's starting points are intended to be for full and final damages or provisional damages. I consider that in those circumstances it is appropriate to adjust the figure of £30,000 up slightly. I consider that an award of £32,000 is appropriate in this case. It places the Claimant towards the higher end of the cases to which I was referred, and towards the higher end of the lower bracket. I consider that appropriate on the facts of his case.

Special damages

51. The Claimant also has a claim for special damages. He explains in his second witness statement of 16 July 2019 that the only financial losses he has suffered are for travelling to and from medical appointments. He has produced a schedule of loss dated 17 December 2019 which seeks £500 in special damages for past and future travel. He was ordered to serve an updated schedule by 10 July 2020, but chose to continue to rely on the earlier schedule.
52. The Defendant served a counter-schedule dated 21 July 2020. It did not dispute the principle of the Claimant's entitlement to damages for travel to and from medical appointments, but noted that no documentary evidence was served to support the amount of the claim. The Defendant noted that it is an approximately eight mile trip to the Claimant's GP, and seven miles to the hospital. It noted that the evidence suggested three trips to hospital in 2018-9, with no further trips proposed. The Defendant's counter-schedule assumed four past and future trips to the hospital and four to the Claimant's GP. It reached a total for mileage and parking of £48,

53. At the hearing before me Mr Bowley accepted that, if the Claimant were to require only eight medical trips, the sum of £48 was roughly correct. He noted, however, that it was necessary to take into account the prospect of deterioration in the Claimant's condition and the consequence of his needing further hospital and GP visits over the next 10-15 years. I accept that. Even taking that into account, however, to reach a figure of £500 would mean the Claimant requiring more than 80 visits to the hospital or his GP because of his asbestosis. Even with the predicted deterioration of 5% in the Claimant's condition, that seems unlikely. There is inevitably a degree of speculation, but I would award £100 for special damages which would cover a total of around 16-17 past and future trips to the Claimant's hospital and GP in relation to his asbestosis

Other matters

54. The other issues in the case are agreed. The identification of and wording for the three return conditions to be included in the Provisional Damages Order are agreed. The principle that the Claimant will need to give credit for the £20,000 interim payment and for certain benefits, is also agreed, and the same is true of the Claimant's entitlement to interest on the general damages. I will leave counsel to draw up the appropriate order covering those matters as well as the other conclusions in this judgment.

Conclusion

55. For the reasons set out above, I consider that the Claimant is entitled to £32,000 in general damages on a provisional basis and £100 in special damages. I wish to thank counsel for both parties for the clear and helpful way they presented their submissions orally and in writing.