[2022] EWHC 1170 (QB)

QB-2022-000986

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

20 May 2022

Before :

MASTER DAVISON

- -

Between :

PETER BROOKS	**Claimant**
- and -	
ZURICH INSURANCE PUBLIC LIMITED COMPANY (1) **AVIVA INSURANCE (UK) LIMITED (2)**	**Defendants**

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- -

Mr John Paul Swoboda (**Boyes Turner**) for the **Claimant**
Mr Patrick Limb QC (**Keoghs**) for the **Defendants**

Hearing date: 12 May 2022

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Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 20 May 2022 at 10.30am

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Introduction

1. The claimant in this case is 68 years of age. From his early twenties to his late thirties, he worked as a maintenance engineer at a paper mill in Enfield. His employers were first Ruberoid Paper Ltd and then Ruberoid Building Products Ltd (though there was no break in employment). In the relevant period, these companies were insured by the two defendants to this action: "Zurich" and "Aviva" (together "the insurers"). The employer companies have now been dissolved. The claimant's work brought him into contact with asbestos lagging and asbestos brake pads (which were part of the machinery he maintained). Some 30 years later, in March 2020, he began to suffer from the first symptoms of what proved to be mesothelioma. He was formally diagnosed in April 2021. His symptoms have progressed and his life expectancy is severely curtailed. When he examined him in October 2021, Dr Rudd estimated his life expectancy in the range of 6 to 18 months. Liability for the claimant's industrial disease is not in issue. He would like to conclude his claim as soon as possible. He has a particular reason for wanting the claim concluded within his lifetime, which is that his wife suffers from dementia. She would be unable to progress a claim and he wishes to die with the certainty that there are funds available for her.

2. In these circumstances, the claimant has elected to bring his claim directly against the insurers pursuant to the Third Parties (Rights Against Insurers) Act 2010. He has done that in order to avoid having to take the preliminary steps of (a) restoring the companies to the register, (b) obtaining a judgment against those companies and then (c) applying to enforce the judgment in separate proceedings against the insurers under the Third Parties (Rights Against Insurers) Act 1930. The beneficial effect of the 2010 Act – if it applies – is to condense those three steps into a single action. I am told that applying to restore a company to the register can currently take up to 6 months.

3. The Act came into force on 1 August 2016. It does not have retrospective effect; see *Redman v Zurich Insurance plc and another* [2017] EWHC 1919 (QB). The operative provision of the Act is section 1:

> **1 Rights against insurer of insolvent person etc**
>
> (1) This section applies if—
> (a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or
> (b) a person who is subject to such a liability becomes a relevant person.
> (2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the "third party").
> (3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability.

4. For present purposes, "relevant person" includes a dissolved company. The Ruberoid companies were dissolved long before the Act came into force. So the question is when liability to the claimant was incurred. Turner J in the *Redman* case held that a relevant person incurs a liability under section 1 of the 2010 Act when the cause of action is complete and not when the claimant has established the right to compensation against the wrongdoer whether by a judgment or otherwise.

Was the claimant's cause of action against his employers complete before 1 August 2016?

5. This comes down to a single issue, which is whether the claimant suffered actionable damage prior to 1 August 2016. If he did, he cannot proceed under the 2010 Act and must, instead, proceed under the 1930 Act, with the inevitable delay that that would involve.

6. The issue arises in the context of the defendants' application to strike out the claim under CPR rule 3.4(2)(a). The defendants say that the claim is bound to fail because the claimant's mesothelioma, although symptomless until March 2020, must nevertheless have progressed to the stage of angiogenesis (the tumour developing its own blood supply) about 5 years before then. Hence, he had at that time suffered actionable damage; his cause of action was complete and, because that was some 18 months before the date that the 2010 Act came into force, his claim against the insurers under that Act is unwinnable. The claimant resists the application on a number of grounds. But the principal ones are that the claimant disputes (a) that as at the date of angiogenesis he had suffered actionable loss, and anyway (b) that that date was prior to 1 August 2016.

7. For reasons which I will come to, I have decided that the threshold for striking out the claim has not been met and that it would be inappropriate for me to make any decision or ruling on the issue as to what, in law, may constitute actionable damage in a mesothelioma case. But in order to explain that decision, I will first set out the respective arguments of the defendants and the claimant in a little more detail.

The submissions of the parties

8. The principal cases relied upon (by both parties) were the decision of the House of Lords in the pleural plaques case of *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39 and, more recently, the decision of the Supreme Court in the platinum salt sensitivity case of *Dryden & Ors v Johnson Matthey Plc* [2018] UKSC 18. Drawing on *Rothwell*, Mr Limb QC submitted that, in the words of Lord Hoffman, damage was "an abstract concept of being worse off, physically or economically, so that compensation was an appropriate remedy". It did not embrace a condition which had "no perceptible effect" on health or capability. Damage was suffered when the claimant was "appreciably worse off". Mr Limb drew attention to the words of Lord Hope to the effect that an injury which was "without any symptoms at all because it cannot be seen or felt *and which will not lead to some other event that is harmful* has no consequences that will attract an award of damages". He contrasted the italicised words with the facts of this case.

9. From *Dryden*, Mr Limb took me to the judgment of Lady Black. Drawing on the speech of Lord Pearce in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, she approved his formulation of the relevant question as this: "whether a man has suffered material damage by any physical changes in his body"; and this was "a question of fact in each case".

10. Having established the legal test, Mr Limb cited the relevant passage of the medical evidence in this case. The following extract is from the report of Dr Rudd dated 19 October 2021:

> "There is, on average, a long latent interval between first exposure to asbestos and the onset of clinical manifestations of mesothelioma, more than 30 years in most series, but the range of intervals is large, extending down to ten years and perhaps less in rare cases, and upwards with no upper limit. The latent interval between first exposure and the onset of clinical manifestations should not be confused with the interval between commencement of growth of the tumour from the first cell and the onset of clinical manifestations. The latter period is usually much shorter than the former because the mesothelioma does not start to grow as soon as the first fibres are inhaled but after a period of years during which repeated interactions between asbestos fibres and mesothelial cells occur, eventually resulting in the malignant transformation of a mesothelial cell. It is at this point that the tumour starts to grow. Initially growth of the tumour is not dependent upon growth of new blood vessels, a process known as angiogenesis, but eventually this is necessary for growth of the tumour to continue so that it may eventually become clinically manifest.
>
> On the basis of epidemiological evidence and evidence about the growth rates of tumours it may be estimated that mesothelioma probably begins to grow from the first mesothelioma cell about 10 years, on average, before clinical manifestations appear. *Angiogenesis probably commences several years after that and it has been estimated that this may be about 5 years before clinical manifestations appear, on average. However, it must be appreciated that there is no scientific means of determining when the first malignant cell starts to grow or when angiogenesis begins*. There is good epidemiological evidence to

> suggest that asbestos exposure within 10 years of the appearance of clinical manifestations of mesothelioma does not contribute to its causation. All employments involving asbestos exposure up to about 10 years before the onset of clinical manifestations will have contributed to the risk that mesothelioma would develop. The mechanisms of causation are incompletely understood. Thus all exposure which contributed to the risk that mesothelioma would occur should be regarded as having contributed to causation of the mesothelioma." [My italics.]

11. Mr Limb referred to the decision in *Durham v BAI (Run off) Ltd* [2012] UKSC 14 for further detail as to the role and significance of angiogenesis. In the interests of brevity, I will not recite the passages referred to. It suffices to say that Mr Limb relied upon various statements of the judges involved at all three levels, (based upon the evidence of a stellar cast of medical experts (which included Dr Rudd)), that angiogenesis of the tumour marked the point in time when it was inevitable that the mesothelioma would progress to become symptomatic and, in due time, fatal. To use his phrase, at this point "the die was cast". To quote from paragraph 14 of his skeleton, "it is idle to seek to contend that once angiogenesis is underway the affected individual is other than very appreciably worse off, even though he may have no immediate symptoms". Thus, this was the point in time when actionable damage had occurred and the claimant's cause of action was complete.

12. It is convenient to summarise Mr Swoboda's submissions in the following propositions:

    i. A physical change, or even something that might properly be called an "injury" did not necessarily amount to actionable damage. In each case, the question was whether that change was "material" or left the claimant "appreciably worse off".

    ii. The words used by the House of Lords in *Rothwell* and other high authorities to define the concept of actionable damage such as "appreciably", "perceptibly" or "materially worse off" all necessarily implied that damage was detectable or capable of measurement. For example, "appreciable" meant "capable of being estimated or assessed".

    iii. Relying on the medical evidence in this case and on paragraph 52 of the judgment of Rix LJ in the *Durham v BAII* trigger litigation, Mr Swoboda said that the pathogenesis of mesothelioma was, until its late stages, undetectable and undiagnosable and so, by definition, incapable of measurement or assessment.

    iv. At the (still relatively early) stage of angiogenesis, the tumour would cause no symptoms and would be undetectable. Although that state of affairs might constitute a physical change in the body (albeit an unknowable one), the claimant was not appreciably / perceptibly / materially worse off because there were as yet no deleterious effects and no damage that was susceptible to detection or measurement.

    v. It did not matter that at that stage the "die was cast", (if it was). The inevitability of progression of the disease was, by itself, irrelevant. A latent injury or a latent loss of amenity did not sound in damages; see *Guidera v NEI Projects (India) Ltd* (1988) (an asbestosis case).

    vi. In any event, whether there was actionable damage was, in each case, a question of fact. Here, there was no medical evidence relating specifically to the claimant as to the precise date of angiogenesis. Dr Rudd's evidence about the date of angiogenesis was only an approximation based upon epidemiological evidence. The date of angiogenesis in the claimant's case might have been less than 5 years prior to clinical manifestations. Although the claimant would bear the legal burden of proving his claim, he would discharge that burden by reference to the fact that liability was admitted and that he first manifested symptoms in March 2020, (see the speech of Lord Pearce in *Cartledge* at 784). On the basis of the maxim "he who asserts must prove" it would then be for the defendants to show that he suffered damage at a date earlier than 1 August 2016 – a burden which, on the present state of the medical evidence, they would not be able to discharge.

vii. There was, similarly, no evidence specific to the claimant of the point in time when the progression of his disease became inevitable, whether that point in time was (as the defendants contended) angiogenesis or some other time. Thus, even if the defendants were correct in their contention that actionable damage occurred when the "die was cast", they had not shown when it was cast.

13. Mr Swoboda also referred to a well-known principle of law, which is that the court should be wary of dismissing a claim in a developing area of law on the basis of assumed facts; see the speech of Lord Browne-Wilkinson in *Barrett v Enfield London Borough Council* [2001] 2 AC 500 at 557 where he said:

> "In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

Discussion and conclusions

14. I can state my conclusions shortly.

15. The point in time when the claimant suffered actionable damage sufficient to complete his cause of action is a mixed question of law and fact. So far as the law is concerned, two points are obvious. The first is that (to adopt the words of Turner J in the *Redman* case) "identifying the point at which the process of the development of malignancy, for example, gives rise to damage can be medically and legally controversial". The second is that this is an area of law which is "uncertain and developing".

16. I regard the stance taken by each party on the law to be reasonably arguable. There is no authority from England & Wales which is directly on the point. The closest is the decision of McCullough J in the *Guidera* case. But that decision pre-dated the much more recent decisions of the House of Lords and the Supreme Court in *Rothwell* and *Dryden* and, for that reason and the fact that the passage relied upon by Mr Swoboda was *obiter*, cannot be regarded as particularly authoritative. The decision also stands in apparent contrast to the reasoning of the High Court of Australia, which found in *Alcan Gove Pty Ltd v Zabic* [2015] HCA 33 that compensable damage in a mesothelioma case occurs at the point in time when (undetectable) changes are caused to the mesothelial cells. However, *Alcan* is not binding on an English court and neither *Rothwell* nor *Dryden* directly confront the issue. It is therefore presently unclear whether a symptomless, undetectable, physical change in the body which must inevitably progress to incurable disease but the timing and existence of which can only be identified in hindsight marks the point at which actionable damage has occurred. I suspect that further investigation and analysis of this issue will involve examination of the building cases, including the well-known case of *Pirelli General Cable Works v Oscar Faber and Partners* [1983] 2 AC 1 (referred to in passing by McCullough J in *Guidera*.)

17. In reaching the conclusion set out above, I have not overlooked the fact that (as Mr Limb pointed out) the Court of Appeal in the trigger litigation said that "even the unknowable may be regarded as material". But it appears that this was based upon *Cartledge*, (see the judgment of Rix LJ at paragraph 279). And, as Mr Swoboda observed, in *Cartledge* the claimants' disease would have been visible on an x-ray and evident on "unusual exertion". So the physical changes in that case were not, in fact, unknowable or unmeasurable or immaterial. That, at least, was the way that Lord Hoffman interpreted the facts of *Cartledge* in his speech in *Rothwell* (see paragraph 7) and this case is, at least arguably, different.

18. The state of the authorities being as it is, I regard the case as a classic instance where the relevant facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts.

19. That is enough to decide the application. But even if the law were clear, there is no medical evidence in this particular case relating to this particular claimant which establishes the propositions of fact relied upon by Mr Limb to demonstrate that the case is unwinnable. The evidence of Dr Rudd does not say when he thinks that this claimant's disease reached the point of angiogenesis. He was not asked that specific question. Nor does Dr Rudd say that at that point in time (whenever it may have been) progression of the disease was inevitable. It would be unsatisfactory and unfair to the claimant to fill this void by reference to the evidence given in another case (*Durham v BAI (Run off)*) and another context – no matter how impressive the cast of medical experts and lawyers in that case may have been.

20. For these reasons I refuse the defendants' application.

21. It follows that I should also refuse the cross-application – made orally at the hearing – that I should enter judgment in the claimant's favour on this issue. I will, rather, give directions leading to a speedy trial.