

The Correct Application of the Judicial College Guidelines to the Assessment of Damages for Asbestosis and Pleural Thickening

Posted On: 03/11/2020

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In *Hamilton v NG Bailey Ltd* [2020] EWHC 2910 (QB), the High Court sought clarity from the editors of the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* (the "JC Guidelines") about their proper application in asbestosis and pleural thickening cases. [Richard Seabrook](#) of Ropewalk Chambers appeared for the Defendant. The judgment can be found [here](#).

The Facts

Hamilton was a routine, liability-admitted asbestosis claim that, on 8 October 2020, came before Dan Squires QC (sitting as a Deputy High Court Judge) for an assessment of damages hearing. The Claimant was seeking provisional damages with three specific return conditions, which the Defendant was content to agree. The only substantial issue at the hearing was as to the correct valuation of general damages for pain, suffering and loss of amenity assessed on a provisional damages basis. There were Part 36 offers on either side.

The Issue

The Claimant had a respiratory disability of 10%, which it was submitted on behalf of the Defendant put the Claimant in the lower of the two potentially relevant brackets for asbestosis and pleural thickening as contained in the JC Guidelines, namely:

"£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."

The wording of this lower bracket expressly stated that it was applicable to awards for up to a 10% disability assessed on a final or a provisional basis. With no evidence of any particular anxiety, the Claimant being of relatively advanced years and with a modest impact upon him, consistently with the assessed level of 10% disability it was submitted that the award should be no more than £30,000 on a full and final basis and that it should be further discounted to about £24,000-£25,000 to reflect a deduction of the element of a final damages award, which on a provisional damages basis would be covered by the return conditions.

It was argued on behalf of the Claimant that the higher of the two potentially relevant brackets was the appropriate starting point, on the basis that, whilst the Claimant's current disability was 10%, the medical evidence was that he was likely to deteriorate, so that the level of disability would increase above 10%.

The higher bracket in the JC Guidelines provides:

"£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."

On the basis of the likely progression of the respiratory disability to 15-20% it was submitted that the higher bracket was appropriate, with a provisional damages award on the financial cusp of the two brackets, namely £36,000, equating to a final award of about £41,000.

The Judge's Finding as to the Correct Bracket

In accepting the Defendant's submission that the Claimant came within the lower of the two brackets, Mr Squires QC said this at [44] :

"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."

The Difficulty Identified

However, when considering how to approach the assessment of damages within one of the two relevant brackets, the Judge identified a difficulty in ensuring a continuum between the brackets, born out of the wording of the brackets in the JC Guidelines. At [27] he observed:

"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?"

Having heard submissions from both parties, he concluded that both suggested approaches to the application of the Guidelines created difficulties and, at [35], he stated:

"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."

Because of the difficulty identified, and having accepted that damages assessed at £35,000 on a final basis would fall to be reduced by £5,000 (i.e. to £30,000), the judge went on to say this at [50]:

"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."

Conclusion

It is respectfully suggested that *Hamilton* has identified an issue about whether the higher and lower asbestosis/pleural thickening brackets as presently written can be applied as intended, so as to operate as a continuum with the lowest end of one bracket being the same as the highest end of the bracket below. It is hoped that the editors of the JC Guidelines might now take the opportunity to re-draft the wording of the relevant brackets to better achieve the stated aim of ensuring consistency in awards of damages.

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