

Neutral Citation No: [2017] NIQB 136

Ref: BUR10478

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 01/12/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

2016/5762

BETWEEN:

BRIAN McDOWELL AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
JAMES McDOWELL (DECEASED)

Plaintiff

-and-

FISONS LIMITED

Defendant

BURGESS J

[1] The Plaintiff, Mr Brian McDowell, is the son and personal representative of the estate of James McDowell, deceased, who died on 23 September 2015, aged 80.

[2] The cause of death, which is not in dispute, was due to malign mesothelioma, a malign tumour arising on the lining of the chest cavity. The deceased had been exposed to asbestos in or around 1956 to 1960 when employed by the defendant as a relief boiler man/fitter's helper on the defendant's premises.

[3] Damages are sought under the Law Reform (Miscellaneous Provisions) Act (NI) 1937 on behalf of the estate of the deceased, together with damages and interest thereon pursuant to section 33A of the Judicature (N.I.) Act 1978. Liability is admitted, leaving it for the Court to determine the quantum of damages.

[4] Evidence was given by Mr Brian McDowell as to the life led by his father in the years prior to his death. The Court also had the benefit of reading the deceased's General Practitioner's and hospital notes, and hearing the evidence of Dr Geoffrey Todd M.B., M.R.C.P (UK), both orally and in his written report of 11 January 2016.

[5] The Court has a picture of a man who was active, walking and gardening on a regular, if not daily, basis. Without the onset of this condition it is accepted he had a life expectancy of 8 1/2 years, and I have no doubt they would have been years during which he would have continued those activities, subject no doubt to some slowing up. The evidence establishes that the deceased was someone who enjoyed good health for most of his life and indeed there was nothing to indicate any ill

health until he first disclosed symptoms of the medical condition which led to his death. That was in January 2015, when he complained of breathlessness while walking. However, I am satisfied on the evidence that the deceased was a man who did not complain, who accepted whatever might trouble him with stoicism and fortitude. He was portrayed as a private man, who even when struggling with the debilitating and terrible symptomatology inherent in his condition, confronted his fate with dignity.

[6] That personal disposition allows me to be satisfied that the commencement of the impact of his symptomatology preceded January 2015, and that given the extent of the breathlessness at that date when he succumbed to visiting his doctor, a rare event, I am satisfied he suffered such symptoms for an appreciable time prior to January 2015. This period of time during which he struggled with this symptomatology is a relevant factor in my assessment of damages.

[7] Unfortunately, there was a decline in his health, resulting in his inability to walk even short distances; when he couldn't sleep; where he sweated at night to such an extent he required to change his clothing; and lost his appetite reflecting in weight loss. His medication, and the level of that medication, evidenced high levels of pain, which while relieved by the medication unfortunately brought about a number of side effects, including constipation.

[8] Mr Christopher Ringland B.L., for the defence, cross examined Mr Todd as to the period during which the symptomatology would have been developing. He did so with restraint and in an entirely proper manner. He examined a number of entries in the General Practitioner's notes and the hospital notes particularly towards the end of March 2015 where it was recorded that the deceased said he was mobile up to 100m, and otherwise asymptomatic. However, I believe that a reluctance to complain which his son explained to the Court, allows me to decide that the period of decline was from January 2015 to a point that by the end of June 2015 he was taking steroids and morphine. He had refused chemotherapy when told in late March 2015 the nature of his illness, his response being that 'he would take it as it comes'.

[9] While his last months must have been extremely difficult, and while the dreadful symptoms took greater and greater hold, the Court must record that during that time he would have been greatly comforted by the devotion of his son, the plaintiff.

QUANTUM

[10] I was referred by Mr Ringland to the judgement of McCollum L.J. in Gardiner (Personal representative of McVeigh's Estate) v Scruttons plc and others [1999] NIJB 243, which I have found of considerable assistance as to the approach to the assessment of damages, an approach which I adopt as being relevant today. As recognised in Gardiner, no two cases are factually identical, but there are striking

similarities with this case, which further aids the court in determining the level of damages in this case.

[11] Of course levels of damages have increased to reflect the value of money. The Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (4th ed.), published on 4 March 2013, placed the range of damages in cases such as this is between £70,000 and £130,000. It is accepted by both counsel that these figures require adjustment to reflect inflation, giving a present day range of between £77,000 and £140,000.

[12] Mr Dermott Fee Q.C. for the plaintiff argues that this case lies in the middle of the range of damages, while Mr Ringland argues it is at the lowest end. I have considered as relevant the following factors:

- (a) The deceased's condition commenced before January 2015 for the reasons that I have given and I estimate the period to be one of at least 12 months ending in September 2015.
- (b) The decline was on a steady downhill trajectory, with increasing pain, discomfort, and the impact of loss of weight and sleep.
- (c) Contrary to Gardiner, where the deceased is said to have been self-reliant, requiring no formal assistance up to the end, Mr McDowell clearly became more reliant on his son in the months prior to his death, indeed entirely reliant on him in the final months.
- (d) The deceased was fully aware of the nature of his illness from the end of March 2015, some six months prior to his death. While outwardly stoical, I have no doubt he would have experienced considerable anxiety and anguish.
- (e) The deceased was aged 80, and death no doubt had from time to time been on his mind. He was not a young man facing the prospect of an early death, perhaps in circumstances of the loss of enjoyment of a growing and young family.
- (f) The average time of the duration of the illness until death would appear to be no more than 2½ years. This case is obviously not at the upper end of that spectrum, but nor do I see it as being at the very bottom end of the spectrum, as Mr Ringland has sought to argue.

[13] Balancing all of the above factors I determine the general damages to be £95,000 with interest thereon at the statutory rate from the date of death, together with funeral expenses agreed at £2,323.81, together with interest thereon.