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

Delivered:	24/11/00
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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**  
**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**JOSEPH MALLON**

**Plaintiff;**

**-and-**

**HARLAND AND WOLF PLC**

**Defendant.**

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**SHEIL J**

The plaintiff in this action is now aged 59, having been born on 12 May 1941. He is a married man and is a retired painter by trade. He was employed by the defendants in their shipyards as a painter for three different periods, according to their records, namely, from 16 August 1965 to 1 September 1967, from 20 December 1967 to 12 February 1968 and from 21 April 1970 to 1 September 1971. In the course of his work the plaintiff was exposed to asbestos, particularly when painting in the engine room of ships under construction where pipe coverers were using asbestos. In this action he

claims damages against the defendants for alleged negligence and breach of statutory duty by reason of the defendants failure to protect him from the dangers of inhaling asbestos as a result of which he has sustained injury to his lungs. Although the defendants denied liability on the pleadings, in a letter dated 2 March 2000 their solicitors wrote that “insofar as the plaintiff satisfies the court that he has suffered injury to his health as a result of exposure to asbestos during his employment with the defendants, then the defendants will not dispute liability therefore in relation to exposure until 1970.” The plaintiff in the present case has satisfied the court that he sustained injury to his health as a result of the exposure to asbestos in the course of his employment with the defendants. Accordingly the only issue in this action is one of damages, there being no issue of contributory negligence.

The court had the benefit of the following agreed medical reports on behalf of the plaintiff: reports from Dr MacMahon FRCP dated 13 August 1995, 23 April 1997, 4 February 1997, 14 July 1998, 21 October 1998, 31 August 1999, 25 August 2000 and 27 September 2000; reports from Dr Lawson FRCR dated 8 August 1998, 1 November 1999, 28 May 1999 and 12 June 2000; reports from Mr Buick, Senior Clinical Scientist (respiratory medicine) dated 24 June 1998 and 22 September 2000. The court also had the benefit of oral evidence from Dr MacMahon on behalf of the plaintiff. On behalf the defendants the court had the benefit of the following agreed medical reports: Dr Shepherd Consultant Physician dated 27 October 1998, 13 May 1999, 16 October 2000 and 31 October 2000; Dr McIlrath FRCR dated 12 April 1999

and 23 October 2000. At the end of the day there was a large measure of agreement between the doctors with regard to the adverse effect on the plaintiff's lungs of his exposure to asbestos in the course of his employment with the defendants.

The plaintiff has bilateral calcified pleural plaques; while these are merely indicators of exposure to asbestos and do not in themselves cause any physical symptoms, they nevertheless constitute an injury to the plaintiff. He also has diffuse pleural thickening on the right side of his lungs. Dr MacMahon stated that the diffuse pleural thickening on the right side was unlikely to have been related to any cause other than exposure to asbestos. The plaintiff suffers from shortness of breath on climbing stairs or hills. While Dr MacMahon stated that the pleural thickening may be having a small effect on the plaintiff's lung function, he stated that it is unlikely to be contributing very much to the plaintiff shortness of breath which is largely due to his asthma and to his former heavy cigarette consumption. Dr MacMahon further stated that the diffuse pleural thickening on the right side could become more extensive and could develop on the left side, which could lead to an increase in breathlessness; he stated that the risks thereof were relatively small, guessing a conservative estimate of 20%, of which half would be attributable to pleural thickening, while the other half would be attributable to his asthma. Dr MacMahon stated that the plaintiff has had no deterioration in his respiratory function over the last two years.

In addition to the above mentioned injury to his lungs, the plaintiff also claims damages for the understandable worry which he underwent when the possibility was initially raised with him in 1996 and that he might have asbestosis and the other possible complications of exposure to asbestos dust. For a few years prior to 1996 the plaintiff had been complaining of a back problem; eventually he was sent to the Mater Hospital for x-ray examination, which was carried out on 2 February 1996. When his general medical practitioner obtained a report on that x-ray he arranged a consultation with the plaintiff on 11 March 1996 in the course of which he asked him if he had ever been exposed to asbestos. On the plaintiff replying that he had had such exposure, his general medical practitioner referred him for a further x-ray which was carried out on 12 March 1996. The plaintiff was then referred to Dr MacMahon, a leading chest physician in this field who saw him on 24 April 1996. Prior to seeing Dr MacMahon on 24 April 1996 the plaintiff understandably was very worried that he had developed cancer as a result of which he could not sleep with worry and suffered anxiety attacks. However, when the plaintiff saw Dr MacMahon on 24 April 1996 he was reassured by Dr MacMahon that he did not suffer from cancer or asbestosis, Dr MacMahon explaining to him that pleural plaques were merely an indicator of exposure to asbestos. Approximately one year ago the plaintiff had a further scare in that a shadow was seen on his lung and he was sent for a specialist examination which involved, under sedation, a camera being inserted up his nose and down his throat into his lungs. The plaintiff again thought that he

had developed cancer, was understandably very worried, was unable to sleep and was very irritable. Two weeks later he got the results of that examination, which fortunately proved to be negative. He was again reassured that he did not have asbestosis or cancer. The plaintiff states that since then he has tried not to think about the future and the possible development of asbestosis or lung cancer, although at times when his mind wanders he does worry about the future, particularly when he meets former fellow employees who are clearly severely disabled as a result of exposure to asbestos. This aspect of the case was dealt with by Dr Fleming, Consultant Psychiatrist, in his report dated 30 June 1998. Dr Fleming stated that the plaintiff gave him a history of mood disturbance characterised by a depressed mood accompanied by insomnia and a preoccupation with his health for a period of several weeks in 1996 until he was reassured by Dr McMahon that he did not have asbestosis or lung cancer. Thereafter the plaintiff had no significant psychological problems "adopting a stoical attitude to the fact that he has a chest condition, albeit one that is related to asbestos inhalation". I, for my part, found the plaintiff to be an impressive witness who did not exaggerate his evidence in any way.

The plaintiff's wife also gave evidence to the court describing how the plaintiff and the entire family were devastated when in February 1996 it appeared that the plaintiff was possibly suffering from asbestosis and cancer; she described the plaintiff as being very upset, crying and being unable to sleep and having panic attacks. She confirmed however that the plaintiff was

reassured by Dr MacMahon when he was seen by him on 24 April 1996 but that the plaintiff was again devastated when the shadow was later detected on his lung which, as already mentioned, turned out to be a false alarm. She stated that the plaintiff has to attend hospital every six months for a check up and that each time when he receives the letter giving him the appointment he starts to worry again. She stated that he was also very upset when he was informed that when he died there would have to be a post mortem held on his body.

On opening this action Mr Horner QC, who appeared with Mr Cush for the plaintiff, stated that the claim was one for provisional damages in respect of the bilateral calcified pleural plaques, the unilateral diffuse pleural thickening on the right side with a risk of deterioration and the nervous upset and worry suffered by the plaintiff prior to his being reassured that he had not developed asbestosis or any cancer of the lung and the worry that he may in the future develop asbestos related disease. Mr Elliott QC, who appeared with Mr Michael Maxwell for the defendant, agreed that the court should approach the claim as one for provisional damages. That being so it will be necessary, even at this late stage, to amend the statement of claim so to plead in order to comply with the provisions of Order 37 Rule 8(1)(a) of the Rules of the Supreme Court (Northern Ireland) 1980. The power to make an award for provisional damages for personal injury is to be found in Schedule 6 to the Administration of Justice Act 1982, paragraph 10(1) of which reads as follows:

“This paragraph applies to an action under the law of Northern Ireland for damages for personal injuries in

which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.”

Paragraph 10(2) makes provision for rules of court to be made to award the injured person –

- “(a) Damages assessed on the assumption that the injured will not develop the disease or suffer deterioration in his condition; and
- (b) Further damages at a future date if he develops the disease or suffers the deterioration.”

Order 37 rule 8(1) provides:

“The court may on such terms as it thinks just and subject to the provisions of this rule make an award of provisional damages if –

- (a) the plaintiff has pleaded a claim for provisional damages, and
- (b) the court is satisfied that the action is one to which paragraph 10 (of Schedule 6 to the Administration of Justice Act 1982) applies.”

In dealing with this claim as now pleaded, namely a claim for provisional damages in respect of the matters to which I have referred as opened by Mr Horner QC, I have gained some assistance from other recently decided cases cited by counsel, namely *Kelly Deceased -v- Harland and Wolff Plc*, Campbell LJ 30 June 1999; *Maguire -v- Harland and Wolff Plc*, Coghlin J 10 December 1999; *McKinney -v- Harland and Wolff Plc*, Coghlin J 19 May 2000; *Bittles -v- Harland and Wolff Plc*, Girvan J 24 May 2000 and *Phillips Deceased -v- Harland and Wolff Plc*, Gillen J 15 June 2000. Only one of these cases, *Bittles*

*-v- Harland and Wolff Plc* was an award of provisional damages, the other awards being final awards. In that case the trial judge, Girvan J reviewed (a) the law in relation to the circumstances in which it is appropriate to make an award of provisional damages and (b) some of the awards made in such cases and in cases where the award was final. A reference was made by counsel to the first edition of "Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland", drafted in 1996 and published in 1997; I understand that at present a second edition, updating the valuations set out therein, is in the course of preparation. At page 12 of that first edition at paragraph B(a), relating to "Lung Disease", the parameters for "calcified plaques with pleural thickening but no present risk of functional impairment or of cancer" are given as £5,000 to £10,000 for general damages. With reference to those parameters, I prefer the opinion expressed by Coghlin J at page 6 of his judgment in *Maguire -v- Harland & Wolff Plc & Others* (10 December 1999) to that expressed by Gillen J at page 9 of his judgment in *Phillips Deceased -v- Harland & Wolff Plc* (15 June 2000), Coghlin J stating that "these figures, which do not include compensation for any associated risks, also exclude compensation for any anxiety or distress arising from the existence of such risks."

Having considered the evidence in this case, I award the plaintiff the sum of £16,000 in respect of his bilateral calcified pleural plaques, the unilateral diffuse pleural thickening on the right side with a risk of deterioration, including possibly extension to the left side, and the nervous



upset and worry suffered by the plaintiff between 11 March and 24 April 1996, a period of six weeks approximately, and again for a two week period last year when he had a further scare after a shadow was seen on his lung, and lastly for worry that in the future he may develop asbestos related disease. I award the plaintiff interest at the rate of 2% per annum thereon, from the date of service of the writ of summons until the date of trial.

There is no claim for special damage.

The plaintiff may at any time in the future apply to the court for an award of further damages, in accordance with the provisions of Order 37 rules 8 and 10 of the Rules of the Supreme Court (Northern Ireland) 1980, in the event of his developing asbestosis or any other asbestos related disease and any additional worry or psychiatric condition arising from the development thereof.

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**J U D G M E N T**

**O F**

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